Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

October Term, 1994

BOBBY JOE LEWELLEN,

Petitioner,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE and THE METROPOLITAN BOARD OF PUBLIC EDUCATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals erred in holding that Bobby Joe Lewellen must prove that the Metro defendants engaged in conduct intentionally designed to punish him to have a cause of action under 42 U.S.C. § 1983.

LIST OF PARTIES

The petitioner, Bobby Joe Lewellen is an individual. The respondent, Metropolitan Government of Nashville and Davidson County, Tennessee, is a municipality. The respondent, the Metropolitan Board of Public Education, is an agency of the Metropolitan Government of Nashville and Davidson County, Tennessee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 93-5061, although recommended for full-text publication, is reported only unofficially at this time as *Bobby Joe Lewellen v. The Metropolitan Government of Nashville and Davidson County, Tennessee and the Metropolitan Board of Public Education,* No. 93-5061, 1994 WL 459270 (6th Cir. Aug. 25, 1994). All other opinions and orders are unreported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit was filed on August 25, 1994 (App. B, 3a). A suggestion for a rehearing *en banc* was filed on September 7, 1994, which was denied by order of October 12, 1994 (App. A, 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 is set forth in Appendix G, 110a.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1983.[1] Bobby Joe Lewellen was born on September 26, 1966, and has only a high school education. He is married and resides in Kentucky with his wife and his two young children. Mr. Lewellen's entire work history has been as a carpenter or a farm helper. At all times material hereto, Bobby Joe Lewellen was employed as a carpenter by J. Harold Shankle Co., Inc. ("Shankle"). Shankle was the general contractor for the construction of the Tulip Grove

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1. The district court had jurisdiction based on 28 U.S.C. § 1331. Mr. Lewellen filed a timely notice of appeal as of right to the Sixth Circuit Court of Appeals on December 30, 1991.

Elementary School in Nashville. Mr. Lewellen was paid for his work as a carpenter by Shankle at the rate of $8.50 per hour. He was deemed to be a good, dependable worker.

On December 19, 1988, while working for Shankle on the construction of the Tulip Grove Elementary School ("Tulip Grove") in Nashville, Tennessee, Mr. Lewellen was severely injured by electricity from a 23,900 volt overhead "open conductor." This electrical incident occurred on the property of the owner/operator of Tulip Grove, the Metropolitan Government of Nashville and Davidson County, Tennessee and/or the Metropolitan Board of Public Education (hereinafter collectively "Metro Schools").

The 23,900 volt open conductor injured Mr. Lewellen when a piece of steel bridging that he was handling in the course of his work on the construction of Tulip Grove came in contact with or near the open conductor. The open conductor was hanging down to within seven (7) feet of the roof structure of Tulip Grove as Mr. Lewellen and other workers were attempting to complete roofing work on the building. This open conductor ran to Metro Schools' existing Dupont Middle School, directly over the building site of Tulip Grove. The presence of this open conductor directly over the ongoing construction of Tulip Grove and, ultimately, the close proximity of the open conductor to the roof of Tulip Grove were in violation of statutory, safety code and contractual requirements applicable to the construction of Tulip Grove. The open conductor was inherently dangerous and exposed those persons working on the construction of the roof of Tulip Grove to an extraordinary risk of death or serious injury.

As a result of his electrical burns, Bobby Joe Lewellen has lost his right leg below the knee, his left great toe and an adjacent tarsal bone, his right index finger, part of his right ring finger, and his left index finger. He has also lost much of the use of each of his

hands, including total loss of ulnar nerve function, and has numerous disfiguring scars from the electrical burns, skin grafts and surgeries on his upper extremities, his lower left extremity, his chest and his abdomen. Dr. John B. Lynch, Professor and Chairman of the Department of Plastic Surgery at Vanderbilt has determined that Mr. Lewellen is totally and completely impaired due to the amputation of his right leg, the severe injury to the ankle joint of his other leg, the absence of median nerve sensation to both of his hands and his many other injuries. Mr. Lewellen has and will for the remainder of his life suffer continual physical and mental pain from these crippling injuries.

In 1987, Metro Schools determined to build Tulip Grove. When Metro Schools determines to build a school, it first obtains funding for the school, and then selects an architect to work on the school project. No architectural firm can handle more than one Metro Schools' project at a time. After selection of an architect, a committee is appointed by Metro Schools for the planning stage for the school. This planning includes compiling of educational specifications, a determination of the number of classrooms and equipment necessary for the school, and oversite of the design of the school. The architect works with this committee and usually employs an educational planner to assist it in its work. The architect provides necessary engineering services for the mechanical, plumbing and electrical planning and design as part of his contract.

The planning and construction department of the Metropolitan Board of Public Education is involved in the planning of the school, letting the bid for the construction, and overseeing the construction of the school. At all times material hereto, this department was staffed by Everett Henry, its director, John Workman, its supervisor of architectural services, and Roy Weeks, its superintendent of school plant construction. It had no other employees other than secretarial to fulfill these duties. Mr.

Workman and Mr. Weeks reported directly to Mr. Henry. Mr. Henry is a licensed professional engineer and was then responsible for budgeting and planning new schools, directing the architect's work on a school, overseeing the design of the school, and carrying out the construction of the school. Mr. Workman has a Bachelor of Architects degree from the University of Tennessee, but is not a licensed architect. Mr. Workman's duties included the administration of construction contracts, design coordination and observation of construction for Metro Schools' new schools. On Tulip Grove, he assisted Roy Weeks on an as-needed basis in the performance of those duties. He and Mr. Weeks were the two persons for Metro Schools responsible for the administration of the construction contract and construction observation on Tulip Grove. Mr. Weeks was the person primarily responsible for that work. Mr. Weeks has a B.S. from Middle Tennessee State University and a long history of work in the construction industry.

As to Tulip Grove, Mr. Weeks' responsibility was to attend the job meetings on the project, which usually included Shankle, his superintendent, and representatives of the major subcontractors, including as of August 1, 1988, C.E.C. Electrical Contractors, Inc. ("CEC"), the electrical subcontractor. As part of Mr. Weeks' inspection of the job site, he would walk through the construction regularly, review it to see how far it had progressed, approve pay requests and make certain that the construction work was being completed in accordance with the contract documents.

Metro Schools, through Mr. Henry and/or Mr. Workman, reviewed and approved the final plans and drawings, the contract documents, and bid documents for Tulip Grove prior to letting the job for bid. Metro Schools let the Tulip Grove job for bid in May, 1988. The total appropriation of the job was $4,750,000. The estimated project costs were as follows:

Construction	$4,159,152
Architects Fee	245,000
Topographic & Soil - Soil Surveys	12,000
Furniture and Equipment	160,000
Contingency	66,648
TOTAL	$4,642,800

Shankle was the low bidder and was awarded the contract as general contractor. Shankle's total bid was $4,033,082.

Construction of Tulip Grove was not started as early as planned by Metro Schools because of its delay in letting the contract for bid. Therefore, Shankle did not have the time originally contemplated by Metro Schools to complete Tulip Grove. The contract documents provided for a daily penalty if Shankle did not complete Tulip Grove on time. Throughout the construction process, Metro Schools continually insisted Shankle complete Tulip Grove on time or be penalized under the terms of the contract documents.

The contract documents for Tulip Grove, including the plans, drawings and specifications, required that the open conductor running over the site of Tulip Grove to Metro Schools' existing Dupont Middle School be moved as part of the construction of Tulip Grove. The open conductor was to be moved by having Nashville Electric Service ("NES") set another series of the poles and line adjacent to, but not over, Tulip Grove and having underground service run from Dupont Middle School to this new line. Under the contract documents, Shankle or the electrical subcontractor was to build this underground service and coordinate the changeover of the power to the new conductor with Metro Schools and NES. The changeover could not occur without Metro Schools' approval and written permission and only NES could perform the changeover.

After Shankle was awarded the Tulip Grove contract in June, 1988, a pre-construction conference was attended by persons for Metro Schools, Shankle and the architect and engineer chosen by Metro Schools to work on Tulip Grove. During the conference, it was acknowledged that the new open conductor needed to be completed and the changeover of power accomplished prior to the start of classes at the Dupont Middle School in late August of 1988.

On July 11, 1988, Metro Schools received a field report from the architect reporting that the grading contractor was awaiting removal of the existing power line before he could complete his work concerning the east and northeast classroom wings of Tulip Grove, which were located directly under the existing open conductor.

In July, Shankle contacted Metro Schools to request it to coordinate the pole and line installation and changeover of power to the new open conductor with NES. On July 15, 1988, Shankle advised Metro Schools through its architect that excavation on Tulip Grove could not be completed until NES moved the existing overhead conductor. Shankle further advised Metro Schools through its architect that NES had informed Shankle that it was unable to move the open conductor without Metro Schools' written request.

On July 18, 1988, Mr. Henry wrote NES asking that NES move the existing power line. On August 1, 1988, Mr. Henry again wrote NES requesting the installation of the new open conductor poles and line adjacent to Tulip Grove. When Mr. Henry wrote these letters, he knew the electrical subcontractor had not even started construction of the underground service run from the Dupont Middle School to the proposed new open conductor and NES had not begun installation of the new open conductor lines. CEC only became the electrical subcontractor on

the project on August 1, 1988. Accordingly, it was impossible to perform the changeover of the power service. Throughout this time period, Metro Schools continued to allow construction work to be performed directly below the energized 23,900 volt open conductor. Metro Schools made no effort to stop the construction work on Tulip Grove under the overhead conductor, contrary to recognized statutory, safety and contractual requirements.

Four poles for the new conductor line were installed by NES on August 25, 1988 to accomplish the movement of the open conductor. On August 26, 1988, NES installed the line for the first four poles. A dispute occurred between Metro Schools, Shankle and CEC concerning the length of the underground service run as described by the contract documents and as required to reach the closest of the four NES poles. An additional pole was installed closer to the Dupont Middle School by NES on October 25, 1988, as part of the compromise of this dispute. The span of line between the existing four poles and the pole set on October 25, 1988, was installed on November 1, 1988. By November 1, 1988, CEC had completed the installation of the underground service conduit from Dupont Middle School to this fifth NES pole and the new overhead conductor line.

The delay from early August 1988 until November 1, 1988, in completing the proposed new open conductor to allow for changeover of electrical service was caused not only by the above-described dispute, but also in part by CEC's slowness in beginning and correctly completing its part of the work necessary to accomplish the changeover. Throughout this time, construction work was proceeding on Tulip Grove on a daily basis directly below the still energized open conductor with Metro Schools' knowledge, acquiescence and encouragement.

On or about November 1, 1988, Metro Schools knew that one hundred percent (100%) of the site work; ninety-eight

percent (98%) of the concrete work; ninety-five percent (95%) of the masonry block work; sixty percent (60%) of the masonry brick work; sixty percent (60%) of the roofing work; ninety-two percent (92%) of the exterior and underslab rough-in plumbing; forty-four percent (44%) of the electrical rough-in; and twenty-four percent (24%) of the structural steel erection had been completed on the Tulip Grove project. Metro Schools further knew that the roofing of the Tulip Grove project was scheduled to begin in November and the building was to be dried in by the end of December.

On November 2, 1988, CEC contacted NES to coordinate the changeover of service to the new open conductor line and to further advise NES that Metro Schools required five (5) days prior notice before any interruption of the service necessary for such a changeover. Thereafter, for a period of approximately three (3) weeks, a series of contacts occurred between NES, Metro Schools, Shankle and CEC concerning Metro Schools' requirement that the power shutdown and changeover of service to the new open conductor not be performed at any time classes at Dupont Middle School were in session and NES's requirement that it be paid overtime to perform such work on a weekend or holiday. Again, the power shutdown and changeover of service to the new open conductor line could only be performed by NES and only at a time approved in writing by Metro Schools. At any time after November 2, 1988, NES was willing to perform the shutdown and changeover during the week or on weekends or holidays with payment of its overtime charge.

NES's estimated overtime cost for the power shutdown and changeover of service on a weekend or holiday was $600 to $1,000. Metro Schools refused to pay NES's overtime cost to perform the shutdown and changeover on a weekend or holiday, though Metro Schools had the right to hold back this amount from future payments to Shankle or to pay it from the contingency

funds portion of the contract. Metro Schools would not agree to the shutdown and change on any weekday when school was in session.

The contract on Tulip Grove between Metro Schools, as owner, and Shankle, as general contractor, contains the following provisions:

> The owner retains the absolute right to stop work on the project if work is not being performed in compliance with the contract documents. Art. 3, § 3.3.
>
> The owner has the right to step in and perform work on the project with his own forces. Art. 6, § 6.1.1.
>
> The owner can withhold payments to the contractor for unremedied defective work or for failure of the contractor to pay third parties. Art. 9, § 9.6.1.

The contract documents required that the construction of Tulip Grove be performed in compliance with applicable statutory and safety requirements. Such requirements mandated that construction work not be performed directly below an energized open conductor.

Effective as of November 2, 1988, Metro Schools controlled (1) when the changeover of service could and would occur and (2) whether construction work on Tulip Grove would continue directly under the open conductor. From November 2, 1988, until Mr. Lewellen's injury, Metro Schools would not allow the existing open conductor to be neutralized and moved, though it knew (1) that the construction on the building had progressed to

within seven feet of the open conductor; (2) that workers were on the roof structure building the roof; (3) that the open conductor posed an extraordinarily deadly danger to such workers; and (4) that the presence of the new open conductor line adjacent to Tulip Grove could lead such workers to believe that the existing open conductor over Tulip Grove, though still in place, was no longer operable.

On November 21, 1988, Metro Schools agreed that power shutdown, changeover of service and removal of the existing open conductor from over Tulip Grove would occur during Metro Schools' Christmas holiday on December 29, 1988, the estimated time for completion of dry-in of the entire Tulip Grove building. December 29, 1988, was a regular work day for NES, not a weekend or holiday. Thus, by postponing the changeover of service until December 29, 1988, Metro Schools avoided a $600 to $1,000 overtime charge.

Metro Schools made this agreement knowing workers were being constantly exposed to the existing open conductor and were now on top of the Tulip Grove roof structure completing the roof infrastructure. Metro Schools made this agreement knowing that these workers were in extreme danger of death or catastrophic injury and would continue to be exposed to such danger throughout the completion of the roof and dry-in of Tulip Grove. Metro Schools made this agreement knowing it had the contractual right to stop work on the construction of the building until the changeover of service, thereby totally eliminating the immense risk of death or injury to the workers. Metro Schools made this agreement knowing that since November 2, 1988, it had only to agree to pay NES an overtime charge of $600 to $1,000 for the power shutdown and the changeover of service on any weekend or holiday, and the danger of death or injury to such workers from the existing open conductor would cease to exist. Metro Schools made this agreement while simultaneously continuing to encourage Shankle to complete Tulip Grove on

time or face contractual penalties. Metro Schools made this agreement when it had a nondelegable duty to protect workers on the project from this ultrahazardous electrical danger and when it knew the presence of such danger was in violation of applicable statutory, safety and contractual requirements.[2]

In explanation of Metro Schools' conduct, Mr. Henry, the director of planning and construction for Metro Schools, stated in his deposition testimony that:

> He was the person who, on behalf of Metro Schools, would have promulgated guidelines or procedures for monitoring and administering the construction of each school.
>
> Metro Schools *had no policy, procedure, or custom* regarding monitoring for violations of safety rules or regulations.
>
> Metro Schools *had no policy or procedure* for remedying safety violations by a contractor on one of its construction sites.
>
> Metro Schools had never stopped a job to protect the safety of workers on the job.

Mr. Henry further stated that:

> *It is the policy and custom* of Metro Schools

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2. *See International Harvester Co. v. Sartain*, 222 S.W. 2d 854 (Tenn. Ct. App. 1949) (holding that where electricity is involved, the owner is under the nondelegable duty to see that appropriate preventative measures are adopted); *Hendrix v. City of Maryville*, 431 S.W. 2d 292 (Tenn. Ct. App. 1968) (applying the nondelegable duty to a municipal corporation).

> not to pay any fees or costs relating to electric service or electric service changeovers after the awarding of a construction contract. Thus, affirming that if "in this case NES requested overtime pay for moving the lines on the weekend, it would have been the policy and the custom of the School Board to automatically refuse that payment."
>
> Only Metro Schools could authorize a change of service from one power line to another because the meter was in its name.

Mr. Henry made these statements recognizing and acknowledging that (1) the energized 23,900 volt open conductor posed an ultrahazardous electrical danger to persons working under it; (2) any worker who came in contact with or too close to the conductor would suffer death or serious injury; (3) the dangers posed by the open conductor to workers on the roof of Tulip Grove were known to Metro Schools; and (4) Metro Schools knew that performance of construction work under and in close proximity to the open conductor violated applicable statutory and safety rules and regulations and Metro Schools' contract documents for the construction of Tulip Grove.

The respondents filed a motion for summary judgment in this case, asserting that Mr. Lewellen could not establish a cause of action under 42 U.S.C. § 1983. The district court referred the respondents' Rule 56 motion to the Magistrate Judge. The Magistrate Judge correctly concluded that Mr. Lewellen has not only stated a cause of action, but has also mustered the proof necessary to take his claims to trial. (App. E, 38a). The district court rejected the Report and Recommendation of the Magistrate Judge, granted Metro Schools' motion for summary judgment, and dismissed Mr. Lewellen's case with prejudice. (App. C and

D, 18a, 36a). Mr. Lewellen filed a timely appeal to the Sixth Circuit Court of Appeals.

On appeal, Mr. Lewellen argued that the district court erred in granting the motion for summary judgment. The Sixth Circuit rejected Mr. Lewellen's argument on the grounds that under this Court's decision in *Collins v. City of Harker Heights,* 503 U.S. __, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992), only "arbitrary conduct intentionally designed to punish someone" is sufficient to result in liability under § 1983, and Mr. Lewellen's proof did not meet that test. (App. B, 3a).

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit panel in this case represents a complete departure from the traditional rules in § 1983 cases and a flawed reading of *Collins v. City of Harker Heights,* 503 U.S. __, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). This Court should issue a writ of certiorari to correct the misconceptions of the Sixth Circuit concerning *Collins* and 42 U.S.C. § 1983.

As this Court has pointed out, "proper analysis" of a § 1983 claim against a municipality requires consideration of two separate issues: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Id.,* 117 L. Ed. 2d at 270. In this case, the Sixth Circuit, focusing on the first issue, found that Mr. Lewellen had not presented sufficient proof of a constitutional violation.

The due process clause is " 'intended to secure the individual from *the arbitrary exercise* of the powers of government.' " It is not intended as a " 'font' " for traditional tort claims. *Daniels v. Williams,* 474 U.S. 327, 88 L. Ed. 2d 662, 668, 669, 106 S. Ct. 662 (1986) (emphasis added, citations omitted). To ensure that

traditional tort claims are not asserted in the guise of constitutional violations when there has been no arbitrary exercise of governmental power, the law requires that a § 1983 plaintiff prove what is called "a deprivation in the constitutional sense." *Id.*, 88 L. Ed. 2d at 667.

Without a "deprivation" there can be no colorable § 1983 claim. Merely negligent conduct by a government official, even though causing injury, is not a constitutional "deprivation." *Id.*, 88 L. Ed. 2d at 668. This Court teaches that the word "deprive" in the due process clause requires something more than a negligent act. *Id.*, 88 L. Ed. 2d at 667. On the other end of the spectrum, this Court holds that an *intentional* violation of someone's liberty interest does amount to a constitutional deprivation. *Id.*, 88 L. Ed. 2d at 688.

This Court in *Daniels* expressly left open the question of whether something more than mere negligence but less than intentional conduct will suffice to trigger due process clause protection. Since *Daniels,* the majority of circuit courts addressing this question have held that "an intentional assertion of government power that tended to show a disregard of plaintiff's physical safety may amount to gross negligence, recklessness or deliberate indifference sufficient to overcome the *Daniels* or *Davidson* bar and state a claim under section 1983." *Woodrum v. Woodward County,* 866 F.2d 1121, 1126 (9th Cir. 1989). The Sixth Circuit opinions, consistent with the majority view, have held specifically that gross negligence is sufficient to trigger due process clause protection. *Vinson v. Campbell County Fiscal Court,* 820 F.2d 194, 199 f. (6th Cir. 1987); *Nishiyama v. Dickson County,* 814 F.2d 277, 283 (6th Cir. 1987) (*en banc*).

The Sixth Circuit has now, in *Lewellen v. Metropolitan Gov't. et al.*, abruptly departed from the case law in this area. The Sixth Circuit held that *Collins* requires an *intentional* act by a

municipality for it to be liable under § 1983. Thus, to state a claim under § 1983, the defendants must "engage in arbitrary conduct intentionally designed to punish someone." (App. B, 3a). According to the Sixth Circuit, only that kind of "deliberate misconduct" may result in liability under § 1983. The Sixth Circuit found that after *Collins* "what seems to be required is an intentional infliction of injury . . . or some other governmental action that is 'arbitrary in the constitutional sense.' " (App. B, 3a).

The Sixth Circuit erred in holding that this Court's decision in *Collins* requires intentional conduct in order to state a cause of action under § 1983. Contrary to the Sixth Circuit's opinion, the reasoning of this Court in *Collins affirmatively supports Mr. Lewellen's* § 1983 claim.

The question addressed in *Collins* was whether 42 U.S.C. § 1983 provides a remedy for a municipal employee who is fatally injured in the course of his employment because the city customarily failed to train its employees about hazards in the workplace. *Collins,* 117 L. Ed. 2d at 268.

Mr. Collins was a sanitation worker employed by the City of Harker Heights in Texas. In the normal course of his job, while he was working in a manhole to unstop a sewer line, he died of asphyxia. His widow's § 1983 action against the city had alleged that the city violated Collins' civil rights by following a custom and policy of not training its employees about the danger of working in sewers, not providing safety equipment, and not providing safety warnings. *Id.*

The city moved to dismiss under Rule 12(b)(6). This Court focused on the issue of whether the complaint alleged a constitutional violation. Important to the Court was what the complaint did *not* allege. The complaint did *not* allege a willful

violation of the decedent's rights, a deliberate infliction of harm, or knowledge of a significant risk of injury. *Id.* The Court read the complaint as advancing two theories: (1) that the Constitution imposes on a city the duty to provide minimal levels of safety and security in the workplace — a kind of constitutional OSHA —, or (2) that the city's "deliberate indifference" to Collins' safety was "arbitrary governmental action" that "shocks the conscience." *Id.*, 117 L. Ed. 2d at 273-74.

The Court held that the first theory is not cognizable under § 1983. The second theory, on the other hand, is a recognized basis for § 1983 liability. The *Collins* Court was "not persuaded," however, that the violations alleged by Mrs. Collins — failure to train employees or to warn them about known risks of harm — could "properly be characterized as arbitrary, or conscious-shocking, in a constitutional sense." *Id.*, 117 L. Ed. 2d at 275. The Court viewed the *Collins* case as a case involving simple negligence.[3] *Id.*

The *Collins* Court merely found that Mrs. Collins' particular allegations were not enough to make out a constitutional violation. Although the alleged conduct of the City of Harker Heights did not cross the constitutional tort line, the decision in no way forecloses suit in cases where the conduct crosses the line. Thus, *Collins* holds open the door for § 1983 suits against municipalities that have deliberately created a specific, ultrahazardous danger and subsequently failed and refused as a matter of policy and custom to take any action to defuse the potential for harm.

The *Collins* Court in no way intimated that gross negligence,

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3. "Petitioner's claim is analogous to a fairly typical state law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment." *Id.*

as defined by the Sixth Circuit in *Nishiyama v. Dickson County, Tennessee,* 814 F.2d 277, 288 (6th Cir. 1987), is insufficient for § 1983 liability. In fact, the definition of gross negligence set forth in *Nishiyama* requires a level of conduct consistent with this Court's decision in *Collins.* A constitutional deprivation under § 1983 occurs:

> if a person intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Nishiyama v. Dickson County, Tennessee, 814 F.2d 277, 282 (6th Cir. 1987). The facts in Mr. Lewellen's case meet and surpass that standard. Thus, Mr. Lewellen has stated a cause of action under § 1983 against Metro Schools.

Mr. Lewellen's case is vastly different from *Collins.* The *Lewellen* complaint alleges all the things that the Court found lacking in the *Collins* allegations. Mr. Lewellen's claim is not the general "failure to provide a safe work place" claim that doomed Mrs. Collins' § 1983 action. Moreover, Metro Schools' conduct can only be characterized as arbitrary or conscious-shocking in the constitutional sense.

The *Collins* complaint did not charge the city with an intentional violation of Collins' rights. 117 L. Ed. 2d at 273. Mr. Lewellen's complaint plainly charges the Metro defendants with an intentional violation. And there is more than enough evidence from which a jury could find for Mr. Lewellen on that issue. The *Collins* complaint did not allege that the city knew or should have known that there was a significant and specific risk that would injure Collins. *Id.* Mr. Lewellen's complaint contains precisely

such allegations and the evidence would support such a finding by the jury. Unlike Mrs. Collins, Mr. Lewellen has alleged, and the evidence clearly supports, a finding of a constitutional violation.

Metro Schools' conduct is precisely the kind of conduct that rises to the level of a constitutional tort. Metro Schools had the contractual right and legal obligation to alleviate a known ultrahazardous electrical trap. Metro Schools affirmatively maintained this very specific and known electrical trap as unsuspecting workers came ever closer to danger. Death or serious injury of one or more of these workers was highly probable, if not virtually certain, as a result of Metro Schools' conduct. In accord with its policies and procedures, Metro Schools deliberately, knowingly, arbitrarily and callously exposed unsuspecting workers working on Tulip Grove to the risk of electrocution or serious electrical injury. Indeed, Metro Schools had a *policy of deliberate indifference* to a specific known ultrahazardous electrical danger totally within its control from November 2, 1988 until Mr. Lewellen's injury on December 19, 1988. Such conduct shocks the conscience.

Metro Schools has stipulated in this case that the open conductor was *inherently dangerous*. Metro Schools chose to build Tulip Grove directly under the open conductor. Metro Schools knew for months that the 23,900 volt open conductor was required to be, but had not been, moved as construction of the school building progressed toward the open conductor, in violation of applicable statutory and safety requirements and Metro Schools' own contract requirements. Metro Schools knew that after the completion of the new open conductor adjacent to Tulip Grove, the construction workers on the site had no way of knowing that the existing open conductor under which they were building Tulip Grove was still energized with 23,900 volts of electricity.

The risk posed by this 23,900 volt open conductor was neither speculative nor negligible. Metro Schools knew that an extraordinary risk of harm existed with workers building the school directly under and within seven (7) feet of the open conductor. The specific risk of electrocution or massive electrical injury to construction workers was known to Metro Schools. Metro Schools silently watched this risk increase each work day as the construction on Tulip Grove progressed ever closer to the open conductor. Metro Schools' policies and procedures prevented Metro Schools from exercising its contractual rights and meeting its legal obligations by eliminating the known danger or stopping the work to protect the workers. Metro Schools knew or should have known that it was only a matter of time before someone at the site was injured or killed by coming too close to, or in contact with, the open conductor. Metro Schools had a nondelegable duty under Tennessee law to protect such workers from the dangers of this electrical hazard, but its policies and procedures forbade it to act. In complete disregard of this ultrahazardous electrical danger, Metro Schools encouraged the contractor to continue to work so that construction would be finished on time, regardless of the exposure of unsuspecting workers to almost certain electrocution or injury.

Knowing of the risk, knowing of the high likelihood of severe harm or death if the risk were not removed, knowing it was Metro Schools' contractual right and legal obligation to act to remove this specific danger or otherwise protect these workers, and knowing as of November 2, 1988, that it had almost total control of this terrible hazard, Metro Schools deliberately, arbitrarily and capriciously disregarded the risks and its duties. This is not a resource allocation case. Metro Schools did not need to monitor the construction site more closely. Metro Schools simply needed to act on the information that it already possessed from its monitoring activities in regard to this construction project. Metro Schools failed to take any action in response to a

known, extreme danger, though simple options were open to it that would immediately end the danger. Metro insisted on not interrupting power to the Dupont Middle School despite the ever-increasing risk of electrocution or serious electrical injury to workers on the roof of Tulip Grove. Metro Schools categorically refused to pay a mere $600 - $1,000 that would have ensured the prompt removal of the electrical hazard, which sum it could have held back from Shankle's future draws or paid from the contract's contingency funds. Metro Schools did not stop work on the project until the danger was removed, as it was entitled to do under the contract documents. Metro Schools did not take any appropriate measures to prevent injury or death to workers on the roof of Tulip Grove as it had a nondelegable duty to do under state law.

The policies and procedures of Metro Schools first assisted in creating the ultrahazardous electrical danger on its property in July, August, September and October 1988. When on November 2, 1988, Metro Schools came into essentially sole control of the maintenance of the ultrahazardous danger posed by the open conductor, then its policies and procedures operated to prevent Metro Schools from acting in one of a number of ways to eliminate the specific, ever-increasing risk of death or injury to unsuspecting workers working on the Tulip Grove roof. These policies and procedures were contrary to Metro Schools' contractual rights and its legal obligations. With full knowledge of the extraordinary risks posed by the open conductor and its absolute right to eliminate such danger or stop the construction work, its policies and procedures caused Metro Schools to intentionally and deliberately disregard the safety of workers as they came ever closer to almost certain electrocution or serious electrical injury. Such policies and procedures and Metro Schools' conduct are arbitrary and capricious in every sense and caused a deprivation of Mr. Lewellen's constitutional rights. Unlike Mrs. Collins, Mr. Lewellen has presented ample evidence

to take his theory of arbitrary, capricious government action to the jury.

The Sixth Circuit erred in concluding that Mr. Lewellen had presented no proof of a constitutional violation. Under this Court's decision in *Collins,* Mr. Lewellen has presented sufficient proof of arbitrary government conduct to take his case to the jury. As Judge Posner has stated, the government cannot put a man into a snake pit and escape § 1983 liability. *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982).

CONCLUSION

This Court should grant this petition and issue a writ of certiorari based on the Sixth Circuit's complete disregard of the law under 42 U.S.C. § 1983 and its flawed interpretation of this Court's decision in *Collins v. City of Harker Heights,* 503 U.S. __, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 12, 1994

No. 93-5061

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOBBY JOE LEWELLEN,

Plaintiff-Appellant,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; THE METROPOLITAN BOARD OF PUBLIC EDUCATION,

Defendants-Appellees,

ELECTRIC POWER BOARD OF METROPOLITAN GOVERNMENT, et al.,

Defendants.

ORDER

BEFORE: MERRITT, Chief Judge; NELSON and BOGGS, Circuit Judges.

The court having received a petition for rearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk *se*

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 25, 1994

No. 93-5061

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOBBY JOE LEWELLEN,

Plaintiff-Appellant,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE and THE METROPOLITAN BOARD OF PUBLIC EDUCATION,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

Decided and Filed August 25, 1994

Before: MERRITT, Chief Judge; and NELSON and BOGGS, Circuit Judges.

DAVID A. NELSON, Circuit Judge. This is a civil rights case brought by a workman who was accidently injured on a school construction project. Contending that the accident was a result of intentional or grossly negligent acts and omissions on the part of the defendant school board, and characterizing the board's conduct as "reckless and/or undertaken with deliberate

indifference to plaintiff's personal safety," the plaintiff brought suit under 42 U.S.C. § 1983 against the board and the metropolitan government of which the board is an agency. The plaintiff's theory was that the defendants had deprived him of liberty and/or property without due process of law in violation of his "substantive" rights under the Fourteenth Amendment of the United States Constitution. (See *Daniels v. Williams*, 474 U.S. 327, 331 (1986), explaining that the Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them;" this is the concept embodied in the phrase "substantive due process.")

The district court (Higgins, J.) granted summary judgment to the defendants. The court acknowledged the existence of a genuine dispute of fact as to whether the defendants had been negligent, but held as a matter of law — largely in reliance on the unanimous opinion of the Supreme Court in *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992) — that no constitutional violation had occurred. We agree, and we shall affirm the judgment.

I

The plaintiff, Bobby Joe Lewellen, was employed as a carpenter by a company that held a contract to construct an elementary school building for the defendant board of education. The building was to be erected next to an existing structure that housed a middle school. A portion of the new building site lay directly beneath a 23,900-volt "open conductor" power line used to supply electricity to the existing school.

The architect's plans for the new building specified that the power line was to be moved in the course of construction. The

construction contract provided that the general contractor or its electrical subcontractor would coordinate the move and would pay the local utility company for doing the work. It was anticipated that the relocation of the line would require an interruption of electrical service to the middle school for a period of six to eight hours.

At a pre-construction conference attended in the spring of 1988 by school officials, the general contractor, and others, it was recognized that the power line ought to be relocated before the middle school opened for classes in the fall. Unfortunately, however, the preliminary work necessary to effect the relocation was not completed until November 1, 1988.

The school board was unwilling to allow power to be shut off to the middle school while school was in session, and the utility company insisted on being paid the overtime costs that would be incurred in performing the changeover on a weekend or holiday. It was estimated that these costs would come to between $600 and $1,000. The school board, the contractor and the electrical subcontractor all denied responsibility for paying the additional overtime costs. Finally, on November 21, 1988, it was agreed that the changeover would be made on December 29, a weekday when school would not be in session because of Christmas vacation.

Construction of the new school building had been proceeding throughout the summer and fall of 1988, and the structural work was essentially complete by mid-December. When the framework of the new building was finished, the top of the building came within seven feet of the power line.

It is uncontested that the presence of the energized power line this close to the new building violated applicable safety and

electrical code standards. The construction contract made the contractor responsible for safety precautions on the job, but the school board had a contractual right to order that work be stopped if the contractor persistently failed to comply with the terms of the contract. The board did not order a stop, and it had no internal procedure for monitoring any of its construction sites (some seven different schools were under construction at the time) for safety violations. The board relied on its architect to monitor safety conditions, and neither the board, the architect, the contractor, nor anyone else warned construction workers about the power line.

On December 19, 1988, while plaintiff Lewellen was at work on the roof of the new building, a piece of steel bridging he was carrying came into contact with the power line. Mr. Lewellen sustained a severe electrical shock that caused extensive third-degree burns. His lower right leg, the big toe of his left foot, both index fingers, and the ring finger of his right hand all had to be amputated, and he lost much of the use of his hands.

Mr. Lewellen brought suit against the board of education, the metropolitan government, and others in September of 1989. The claims against the non-governmental defendants were eventually settled, and these defendants were dismissed from the lawsuit in December of 1990. The governmental defendants moved for summary judgment the following May, and the matter was referred to a magistrate judge. Disposition of the summary judgment motion was stayed after the Supreme Court granted certiorari in *Collins v. Harker Heights.*

Once *Harker Heights* had been decided, and notwithstanding the Supreme Court's rejection of the § 1983 claim asserted there, the magistrate judge issued a report in the

case at bar recommending that the defendants' summary judgment motion be denied. The district court rejected the recommendation and entered summary judgment for the defendants. This appeal followed.

II

In 1871 — six years after the end of the Civil War and three years after the ratification of the Fourteenth Amendment — Congress enacted the statute now codified at 42 U.S.C. § 1983.[1] The first sentence of § 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The "threshold requirement" of this statute, the Supreme Court has told us, relates to "whether the plaintiff has been

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1. The principle aims of the 1871 civil rights act have been described as follows: "(1) to override 'invidious legislation' by the states which impaired rights and privileges of citizens of the United States; (2) to provide a remedy for infringement of such rights and privileges where state law was inadequate; and (3) to provide a federal remedy where a state remedy was adequate in theory but not in actual practice." *Wilson v. Beebe*, 770 F.2d 578, 581 (6th Cir. 1985) (en banc) (citing *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961)).

deprived of a right 'secured by the Constitution and laws.' " *Baker v. McCollan,* 443 U.S. 137, 140 (1979). Unless a deprivation of some federal constitutional or statutory right has occurred, § 1983 provides no redress even if the plaintiff's common law rights have been violated and even if the remedies available under state law are inadequate.

The source of the federal right on which plaintiff Lewellen bases his case against the defendants here is the language in § 1 of the Fourteenth Amendment declaring that "[n]o State [shall] deprive any person of life, liberty, or property, without due process of law. . . ." Mr. Lewellen did not lose his life in the accident, but his complaint alleges that he was deprived — without due process — of liberty, property, or both. His brief on appeal does not mention a property interest, but suggests that the accident deprived him of "a constitutionally guaranteed liberty interest . . . in being free from bodily injury."

Historically, as the Supreme Court pointed out in *Daniels v. Williams,* 474 U.S. 327, 331 (1986), the due process guarantee of the Fourteenth Amendment "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." (Emphasis in original.) Our court made a similar observation in *Wilson v. Beebe,* where we held that § 1983 provided no redress for a man negligently shot by a police officer who was attempting to handcuff him:

> "We know of no case in which negligent conduct has been held to constitute a substantive due process violation of the type described in *Rochin v. California* [342 U.S. 165 (1952)] and *Johnson v. Glick* [481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S. 1033

> (1973)], and [we] conclude that a substantive due process violation of this kind does require an intentional act. The factors listed in *Johnson v. Glick* all relate to the purposeful infliction of injury." *Wilson v. Beebe,* 770 F.2d 578, 586 (6th Cir. 1985) (en banc).

The Supreme Court has repeatedly noted, moreover, that the provision in Magna Carta from which our Due Process Clause stems was "intended to secure the individual from the arbitrary exercise of the powers of government." *Albright v. Oliver,* 114 S. Ct. 807, 812 (1994) (citations and internal quotes omitted).[2]

If the defendants in the case at bar had deliberately decided to inflict bodily injury on the plaintiff, the caselaw indicates that a constitutionally protected "liberty" interest would have been compromised. See *Ingraham v. Wright,* 430 U.S. 651 (1977), where the Supreme Court held that Fourteenth Amendment liberty interests were implicated when school authorities deliberately decided to punish schoolboys for misconduct by restraining the boys and paddling them, thereby "inflicting appreciable physical pain." *Id.* at 673-74. See also *Davidson v. Cannon,* 474 U.S. 344, 352 (1986) (Blackmun, J., dissenting).

In the case at bar, however the defendants obviously did not make a deliberate decision to inflict pain and bodily injury on the plaintiff. The defendants may have been negligent, but it is now

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2. The first sentence of Chapter 29 of the fourth Great Charter, issued by Henry III in 1225, reads (in translation) as follows: "No freeman shall be taken or imprisoned, or disseised of his free tenement, liberties or free customs, or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." Plucknett, *A Concise History of the Common Law* 24 (4th ed. 1948).

firmly settled that injury caused by negligence does not constitute a "deprivation" of any constitutionally protected interest. See *Collins v. City of Harker Heights,* 112 S. Ct. at 1070; *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 201-02 (1989); *Daniels v. Williams,* 474 U.S. at 332.[3]

Acknowledging that negligence will not suffice to trigger protection under the Due Process Clause, plaintiff Lewellen argues that the defendants were guilty of more than negligence when they deliberately chose to build a school directly beneath a high-voltage conductor line, deliberately delayed the removal of the line, and willfully disregarded the very high risk thereby created. If negligence lies at one end of a spectrum and intent at the other (see *Daniels v. Williams,* 474 U.S. at 335), the plaintiff suggests that the conduct of the defendants in this case was far enough away from negligence, and close enough to intentional infliction of bodily injury, to constitute a violation of the Constitution.

The Sixth Circuit decision that comes closest to supporting the plaintiff's contention is *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (en banc). In that case the plaintiffs' complaint alleged that a county prisoner — a dangerous felon who had assaulted a young woman in the past — had been given unsupervised use of the county sheriff's patrol cars. One night the prisoner began stopping motorists, pulling them over after

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3. The Court of Appeals for the Fourth Circuit, in the decision affirmed by the Supreme Court in *Daniels,* expressed the view that "negligent injury to the plaintiff's person is not a protectable liberty interest under the due process clause. . . ." *Daniels v. Williams,* 748 F.2d 229, 232 (4th Cir. 1984) (en banc). Whether it is the "liberty" interest that is missing in a negligent injury case or the "deprivation" of such an interest, the result is the same: No constitutional violation has occurred if the injury results from negligence.

activating the flashing blue lights on the patrol car he was driving. The sheriff's department was notified by officials in another county that one of the department's patrol cars was stopping motorists, but nothing was done about it. The prisoner finally pulled over a car driven by the plaintiffs' daughter, and the young woman was murdered. On these extraordinary facts, we concluded that the complaint stated a claim under § 1983 against the county and the responsible officials in the sheriff's department.

Like the complaint before us in the present case, the complaint in *Nishiyama* charged the defendants with "gross negligence." On the facts as stated, we concluded in *Nishiyama* that the allegation of gross negligence "was sufficient to charge [the defendants] with arbitrary use of government power" in violation of the Due Process Clause. *Id.* at 282. The test, we went on to say, was whether the defendant official "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow." *Id.* Referring to the defendants' "wanton disregard" in ignoring the report which had alerted them to the fact that the dangerous convict for whom they were responsible was using their patrol car to stop motorists, and characterizing the defendants' conduct as "outrageous," we held that "such reckless indifference to the risk posed by their actions [was] sufficient to establish a violation of substantive due process under section 1983." *Id.* at 282-83.

The mere allegation of gross negligence — or the use in the pleadings of any other "vituperative epithet," for that matter — will avail the plaintiff nothing, of course, if the facts alleged are not sufficient to make out a constitutional violation. Thus in

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987), where we affirmed the dismissal of a § 1983 action brought by the widow of a man killed in an automobile accident that resulted from a police chase that reached speeds of 120-135 m.p.h., we noted that "[n]egligence does not become 'gross' just by saying so." *Id.* at 1106.

> "The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power. The high speed pursuit alleged in Jones's complaint is not sufficient to state a claim under *Nishiyama." Id.*

In *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189 (1989) — a case decided subsequent to both *Nishiyama* and *Jones* — the Supreme Court rejected a contention that after local government officials had undertaken to protect a helpless child from the known depredations of an abusive father who ultimately beat the child almost to death, it was an abuse of governmental power shocking to the conscience and violative of the Due Process Clause for the officials not to carry out their mission "in a reasonably competent fashion." *Id.* at 197-98. Accordingly, as we had occasion to observe in *Nobles v. Brown,* 985 F.2d 235, 238 n. 1 (6th Cir. 1992), the test we applied in *Nishiyama* to determine whether the defendants' conduct was actionable under § 1983 "may not have survived the Supreme Court's subsequent decision in *DeShaney.*"

Be that as it may, and regardless of whether the result we reached in *Nishiyama* could be justified under current Supreme Court doctrine, it seems clear that if *Nishiyama* had come before

us after the Supreme Court issued its decision in *Collins v. Harker Heights*, we would have had to use a test other than the one we did use. *Nishiyama's* test of a substantive due process violation, relying as it does on an explication of the standard for a particular type of "gross negligence," simply cannot be reconciled with what the Supreme Court said in *Harker Heights*.

The plaintiff in *Harker Heights* was the widow of a sanitation department worker (Larry Collins) who died of asphyxiation from sewer gas after he went down a manhole to work on a clogged sewer line. The hazard was known to the defendant city, because Mr. Collins' own supervisor had been rendered unconscious in a manhole a few months before Mr. Collins started work for the city. According to the complaint eventually filed by Mrs. Collins under § 1983, the city — following a policy of "deliberate indifference toward the safety of its employees" — never bothered to warn its people of the "known hazards" of working in sewer lines and manholes, and it did not teach them how to deal with these known hazards. 112 S. Ct. at 1063-64. The city acted "intentionally," the complaint further alleged, in failing to provide safety equipment and training required by a state statute. *Id.* Under the plaintiff's theory, the deliberate indifference attributed to the city was "arbitrary" and "shock[ing to] the conscience." *Id.* at 1069.

Sustaining a demurrer to the complaint, the district court dismissed the action pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court of appeals, in an opinion reported at 916 F.2d 284 (5th Cir. 1990), affirmed the dismissal. Without reaching the question of whether there had been a deprivation of a constitutional right, *id.* at 287, the court of appeals based its holding on the conclusion that the city, which was acting in its capacity as an employer rather than as a governing authority, had not been guilty of "an

abuse of *governmental power.*" *Id.* at 286 (emphasis in original). The court viewed abuse of governmental power as a separate element of a § 1983 claim.

The result reached by the Fifth Circuit in *Harker Heights* was contrary to the result reached by the Eighth Circuit in a factually similar case, *Ruge v. City of Bellevue,* 892 F.2d 738 (8th Cir. 1989). The Supreme Court granted certiorari in *Harker Heights* because of the conflict with *Ruge* and because of concern about the Fifth Circuit's interpretation of § 1983. 112 S. Ct. at 1065.

As to the latter concern, the Supreme Court rejected the notion that § 1983 requires "proof of an abuse of governmental power *separate and apart* from the proof of a constitutional violation." *Id.* (emphasis supplied). It would be absurd, the Court suggested, to suppose that while deliberate indifference to the safety of employees could not give rise to liability under § 1983, "equally deliberate indifference to the safety of pedestrians" could give rise to such liability if it "resulted in a fatal injury to one who inadvertently stepped into an open manhole. . . ." *Id.*[4]

Whether or not the injured party is a governmental employee, *Harker Heights* teaches, the first question to be decided is whether the injury was caused by a constitutional violation. If that question is answered in the affirmative, the second question is whether the defendant is responsible for the

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4. By indicating that persons not employed by the government are likewise precluded from recovering under § 1983 for injuries caused by the government's "deliberate indifference" to a known risk — at least if such persons have not already been deprived of their liberty by imprisonment or the like, *id.* at 1069-70 — the Supreme Court's opinion restricted the sweep of § 1983 far more than the Fifth Circuit's opinion had done.

violation. *Id.* at 1066. While "deliberate indifference" may have a bearing on how the second question is answered — the Court assumed, for purposes of decision, that deliberate indifference could provide a substitute for responsibility based on a respondeat superior theory, *id.* at 1068 — the Court squarely held, notwithstanding the complaint's allegation of "deliberate indifference," that there had been no constitutional violation and that the complaint thus did not state a claim on which relief could be granted under § 1983.

Noting that the Constitution does not guarantee a workplace free of "unreasonable" risk of harm, *id.* at 1070, pointing out that the allocation of financial resources involves policy choices that must be made by locally elected representatives, as opposed to federal judges, *id.*,[5] and rejecting Mrs. Collins' suggestion that the city's violation of the state safety statute supported her substantive due process claim, *id.*, the Supreme Court explicitly approved dismissal of Mrs. Collins' lawsuit. In so doing, the Court implicitly signaled disapproval of the "contrary decision" of the Eighth Circuit in *Ruge v. City of Bellevue,* 892 F.2d 738.

The record in the case at bar is more fully developed than that in *Harker Heights,* this case having been decided on a motion for summary judgment under Rule 56 and not on a motion to dismiss under Rule 12(b)(6). Examining the record in the light of *Harker Heights,* we find no basis at all for concluding that the defendants in this case committed a constitutional violation — and without a constitutional violation, as we have seen, there can be no recovery under § 1983.

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5. Thus it is not up to the courts to say in the case at bar that the defendant school board should have chosen to pay the extra $600 – $1,000 necessary to have the power line relocated on a weekend.

Appendix B

It is true that the defendants acted intentionally in delaying the planned move of the power line, but the *Harker Heights* defendants acted intentionally in sending Mr. Collins down the manhole without warning him of the known hazard from sewer gas and without providing him proper safety equipment. If the defendants in the present case were guilty of "deliberate indifference" to "unreasonable risks of harm," moreover, that was assumed to be the case in *Harker Heights* as well. What the defendants in this case clearly did *not* do was engage in arbitrary conduct intentionally designed to punish someone — *e.g.*, giving a worker "a particularly dangerous assignment in retaliation for a political speech . . . or because of his or her gender. . . ." 112 S. Ct. at 1065 (citations omitted). That kind of deliberate misconduct, *Harker Heights* suggests, may result in liability under § 1983. But the injuries suffered by plaintiff Lewellen, like the death of Mr. Collins, resulted from what at worst was gross negligence. Gross negligence is not actionable under § 1983, because it is not "arbitrary in the constitutional sense." *Id.* at 1071.

When all is said and done, this case, like *Harker Heights,* amounts to nothing more than a non-intentional tort case the facts of which give the plaintiff a strong claim on our sympathies. The Supreme Court has repeatedly declared its unwillingness to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." See *Paul v. Davis,* 424 U.S. 693, 701 (1976); *Daniels v. Williams,* 474 U.S. at 332; *Parratt v. Taylor,* 451 U.S. 527, 544 (1981). The Supreme Court "has always been reluctant to expand the concept of substantive due process," guideposts in this uncharted area being "scarce and open-ended." *Harker Heights,* 112 S. Ct. at 1068. The Court has been particularly reluctant to hold that the highly elastic notion of

substantive due process should be stretched to the point of "impos[ing] federal duties that are analogous to those traditionally imposed by state tort law." *Id.* at 1070 (citations omitted). What seems to be required is an intentional infliction of injury, as we suggested in *Wilson v. Beebe*, 770 F.2d at 586, or some other governmental action that is "arbitrary in the constitutional sense."

We agree with Judge Higgins that whatever the strength of plaintiff Lewellen's claim may be under Tennessee's law of non-intentional torts, Mr. Lewellen cannot show that a constitutional violation occurred in this case. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION DATED NOVEMBER 30, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-89-0735
Judge Higgins

BOBBY JOE LEWELLEN

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.

MEMORANDUM

The Court has before it the Report and Recommendation (entered June 17, 1992; Docket Entry No. 130) of the Magistrate Judge; defendants' objections (filed July 17, 1992; Docket Entry No. 132) to the Report and Recommendation; and plaintiff's response (filed August 19, 1992; Docket Entry No. 134). In his Report and Recommendation, the Magistrate Judge recommended denying the defendants' motion (filed May 3, 1991; Docket Entry No. 87) for summary judgment because the Magistrate Judge found that the evidence raised a general dispute about material issues of fact.

For the reasons set forth below, the Court rejects the Report and Recommendation and sustains the defendants' objections. Accordingly, the defendants' motion for summary judgment shall be granted.

Appendix C

I. BACKGROUND

This is a civil rights action brought by a carpenter, Bobby Joe Lewellen, against The Metropolitan Government of Nashville and Davidson County and its Board of Public Education ("Metro Schools"). The plaintiff alleges that the defendants violated his Fourteenth Amendment right not to be deprived of liberty without due process of law by causing him to be injured during the construction of a school.

In his Report and Recommendation, the Magistrate Judge made an extensive review of the evidence submitted by the parties. *See* Report and Recommendation at 4-15. The following is a brief summary of the uncontested facts revealed by that evidence.

In 1987 Metro Schools decided to build the Tulip Grove Elementary School. Rather than purchase new land, Metro Schools decided to build Tulip Grove on land it already owned, next to the existing DuPont Middle School. Selection of this site, however, necessitated that Tulip Grove be built underneath a high voltage wire known as an "open conductor," which supplied power to DuPont Middle School.

Metro Schools was aware that the open conductor would pose a danger to workers if they worked in close proximity to it. However, the construction plans, which were developed by an outside architect and approved by Metro Schools, called for relocating the conductor during construction. The plans provided that the local utility company, Nashville Electric Service ("NES"), would set a new series of poles for the conductor at a safe distance from the Tulip Grove site and then the general contractor or the electrical subcontractor would run lines to

DuPont Middle School through an underground conduit. The plans, however, did not set a specific timetable for relocation of the conductor.

After Metro Schools approved the construction plans in the spring of 1988, Metro Schools followed its usual policy of deferring virtually all supervision of the project to the outside architect. Pursuant to contract a general contractor was engaged in May, 1988, to build the new school.

In mid-July, the general contractor informed the architect that excavation could not begin until NES removed the overhead conductor. The general contractor also told the architect that NES had indicated that it would not remove the conductor without a written request from Metro Schools. Shortly thereafter, Metro Schools submitted a written request to NES for the conductor to be removed. Nevertheless, the conductor remained in place, and construction proceeded anyway.

In August, the electrical subcontractor observed that NES had spotted the new poles for the conductor at a greater distance than it had anticipated. The electrical subcontractor, therefore, requested the architect to grant it a change order for an additional 230 feet of underground primary line. After consultation with Metro Schools, the architect denied the change order on the grounds that it was not an extra cost item allowed under the contract. Throughout the month of August, construction of the school continued beneath the open conductor.

In September, a series of communications took place between the architect, NES, the general contractor, and the electrical subcontractor concerning the relocation of the conductor. As a result of these discussions, NES agreed to set an

extra pole closer to the DuPont Middle School, thereby reducing the distance the electrical contractor would have to run the underground conduit. The extra pole was set in late October, and the electrical subcontractor completed the conduit the following week. Meanwhile, construction of Tulip Grove Elementary School continued beneath the open conductor. By October 28, over ninety percent of the concrete and masonry block work, as well as sixty percent of the roofing, was complete.

In November, a dispute developed regarding the changeover of power from the overhead open conductor to the underground conduit. This changeover would require the interruption of electric service to the DuPont Middle School for a six to eight hour period. Metro Schools insisted that the changeover occur when DuPont Middle School was not in session, but NES refused to do the job during non-business hours unless it received an overtime premium estimated at between $600.00 and $1,000.00. Metro Schools took the position that the construction contract required the general contractor to pay the overtime premium. The general contractor refused to pay. Eventually, the parties agreed to perform the changeover on December 29, during the Christmas holidays. By the end of November, one hundred percent of the concrete on the project was complete; ninety-five percent of the masonry block was complete; and ninety percent of the roofing was complete.

Bobby Lewellen was critically injured on December 19, 1988, when a piece of steel he was carrying on the roof of the Tulip Grove Elementary School came in contact with the open conductor. At that time, the 23,900 volt conductor was hanging approximately seven feet above the roof on which Mr. Lewellen was working. The proximity of the conductor to the roof of the building was in violation of the applicable statutory and safety code requirements.

Appendix C

Metro Schools maintained no policy for remedying safety violations at school construction sites. In the case of Tulip Grove, the construction contract between Metro Schools and the general contractor, Exhibit 7 to Deposition of John Workman (filed May 3, 1991; Docket Entry No. 97), provided that the general contractor was responsible for maintaining worker safety. See id. § 0700, p. 15.[1] Nevertheless, the proximity of the school to the open conductor was apparent to anyone at the site. At least one representative of Metro Schools' planning and construction department visited the site every week. Furthermore, throughout the construction of Tulip Grove Elementary School, Metro Schools would not permit the open conductor to be removed without its knowledge.

II. DISCUSSION

The statute at issue here is Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides a remedy against any person who, under color of state law, deprives another of rights protected by the United States Constitution.[2] The amended

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1. Despite this provision in the construction contract, the plaintiff has disputed whether this provision alone assigned all responsibility for worker safety to the general contractor. *See* plaintiff's response (filed May 31, 1991; Docket Entry No. 104) to defendants' statement of material facts at 28. This dispute is, nevertheless, immaterial because, as the Court will more fully explain below, the defendants had no constitutional duty to provide a safe workplace. *See infra* pp. 12-13.

2. The section states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

(Cont'd)

complaint (filed December 15, 1989; Docket Entry No. 18) alleges that the defendants, "by [their] intentional or grossly negligent acts and omissions, ha[ve] caused Bobby Lewellen to be subjected to the deprivation of his right to liberty . . . without due process of law, which right is secured by the 14th Amendment to the United States Constitution." Amended complaint at 12.

The Magistrate Judge recommended that the defendants' motion for summary judgment be denied because he determined that there was a material factual dispute whether the defendants' acts or omissions amounted to a violation of Bobby Lewellen's constitutional rights. Report and Recommendation at 36-37. The Court disagrees.

The Magistrate Judge correctly stated the standard by which a court must decide a motion for summary judgment. *See* Report and Recommendation at 15-18. However, the Magistrate Judge erred in his application of the case law interpreting Section 1983. After considering the controlling precedents, in particular, the Supreme Court's recent decision in *Collins v. City of Harker Heights*, __ U.S. __, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Court finds that no "fair-minded jury could return a verdict for the plaintiff on the evidence presented." *See Anderson v. Liberty*

(Cont'd)

> . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214 (1986).

In *Collins*, the Supreme Court explained how courts must analyze Section 1983 claims against municipalities. "[P]roper analysis requires us to separate two different issues when a Section 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation and (2) if so, whether the city is responsible for that violation." *Id.* at __, 112 S.Ct. at 1066, 117 L.Ed.2d at 270. In the instant case, this Court has determined that the plaintiff has failed to make a prima facie showing of any constitutional violation. Therefore, the Court's analysis is limited to the first issue enumerated in *Collins*.

Because the Court finds *Collins* is controlling in this case, it is helpful to review the Supreme Court's opinion in some detail. Mary Jo Collins brought a Section 1983 action against the city of Harker Heights after her husband, a city sanitation worker, died of asphyxia while working in a manhole. Her complaint alleged that the city was on notice of the dangerous conditions in the manholes because her husband's supervisor had been rendered unconscious several months earlier while working in one. *Id.* at __, 112 S.Ct. at 1064 n.1, 117 L.Ed.2d at 268 n.1. The complaint charged that the city violated her husband's substantive due process rights secured by the Fourteenth Amendment.[3]

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3. In both *Collins* and the instant case, the plaintiffs based their claims on the "substantive" component of the Due Process Clause of the Fourteenth Amendment. The Supreme Court in *Collins* described this type of claim as follows:

> Petitioner's constitutional claim rests entirely on the Due Process Clause of the Fourteenth Amendment.

(Cont'd)

Appendix C

The Supreme Court determined that Mrs. Collins' complaint did not assert a constitutional violation, and it affirmed dismissal. In reaching its decision, the Supreme Court reviewed the plaintiff's complaint and observed that it neither charged the city with a "willful violation" of her husband's rights nor that the city or any of its agents had "deliberately harmed" him. *Id.* at __, 112 S.Ct. at 1068-69, 117 L.Ed.2d at 273. "In fact," the Court observed, "she does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there would be a significant risk that he would be injured." *Id.* at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 273.

The Court concluded that, fairly analyzed, Mrs. Collins' complaint asserted two theories for finding a constitutional violation: (1) that the Constitution imposes on a city a duty to provide a safe workplace for its employees or (2) that the city's actions amounted to "arbitrary Government action that must 'shock the conscience' of federal judges." *Id.* at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 273-74 (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183, 190 (1952)).

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> The most familiar office of that Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State. Petitioner, however, does not advance a procedural due process claim in this case. Instead, she relies on the substantive component of the Clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 668 (1986).

Collins, __ U.S. at __, 112 S.Ct. at 1068, 117 L.Ed.2d at 273 (footnote omitted).

The Court rejected the first theory on the grounds that the Due Process Clause does not require a state to provide minimum levels of safety and security. Rather, the Due Process Clause functions as a limitation on a state's ability to act, forbidding a state from wielding its power in an abusive or arbitrary fashion. *Collins*, __ U.S. at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 274.

As to the second theory, the Court implicitly acknowledged that arbitrary or conscious-shocking actions by the city could violate the Fourteenth Amendment. However, the Court determined that the city's behavior, as alleged in the complaint, was neither "arbitrary, [n]or conscience-shocking, in a constitutional sense." *Id.* at __, 112 S.Ct. at 1070, 117 L.Ed.2d at 275. Rather, the Court concluded that the plaintiff's claim was "analogous to a fairly typical state law tort claim" alleging that the city breached its duty of care to the plaintiff's husband. *Id.*

Despite the evident similarities between *Collins* and the present case, the Magistrate Judge concluded that there was evidence of sufficiently deliberate behavior on the part of the defendants to create a question for the jury as to whether the defendants' actions violated Bobby Lewellen's substantive due process rights. Report and Recommendation at 33. "Moreover," the Magistrate Judge continued, "the exposure of workers to such a dangerous situation while arguing over who is to pay $600.00 in removal costs ... evinces arbitrariness by the Metro decisionmakers." *Id.*

The Magistrate Judge's approach is contrary to the teachings of the Supreme Court. In *Collins*, the Court stated: "as a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-

ended." *Collins*, __ U.S. at __, 112 S.Ct. at 1068, 117 L.Ed.2d at 273 (citing *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513-14, 88 L.Ed.2d 523, 532 (1985)). Later in its opinion, the *Collins* Court added:

> Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.

Id. at __, 112 S.Ct. at 1070, 117 L.Ed.2d at 275 (quotation marks and citations omitted).

Had the plaintiff in the present case merely brought a negligence action, the Court would not deny that there exists a genuine factual dispute whether the defendants had exercised "reasonable and ordinary care under the circumstances." *See International Harvester Co. v. Sartain*, 32 Tenn. Ct. App. 425, 457, 222 S.W.2d 854, 868 (1948) (holding that owner of property may be liable for negligence where employee of independent contractor was electrocuted while working on the property). However, that is not the standard by which a court determines whether a *constitutional violation* has occurred. "[T]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property." *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L.Ed.2d 677, 682 (1986); *see also Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d

662, 669 (1986) ("We have previously rejected reasoning that would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the states. . . .") (quotation marks and citations omitted).

The plaintiff in this case has offered no evidence that the defendants ordered Bobby Lewellen to work[4] in proximity to the open conductor or otherwise willfully exposed him to danger. Cf. *Collins*, __ U.S. at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 273 ("[petitioner] does not even allege the [decedent's] supervisor instructed him to go into the sewer . . ."). Rather, the evidence shows that Metro Schools, together with its architect, decided to build the Tulip Grove Elementary School on land it already owned next to the DuPont Middle School.[5] Then, after approving

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4. The plaintiff, Mr. Lewellen, was not an employee of the Metro defendants. He was an employee of the general contractor.

5. In his Report and Recommendation, the Magistrate Judge stated that the defendants "created the danger" that injured Mr. Lewellen when they decided to build the Tulip Grove Elementary School under the open conductor. *See* Report and Recommendation at 4, 32, and 36. The Magistrate Judge then concluded that Metro Schools' failure to remove the danger which it had "created" raised a jury question as to whether Metro Schools violated Mr. Lewellen's civil rights. *Id.* Although the Fourteenth Amendment does not impose on a state an affirmative duty to protect its citizens, it does require a state to protect them from dangers "created" by the state. *See DeShaney v. Winnebago County*, 489 U.S. 189, 198-201, 109 S.Ct. 998, 1004-06, 103 L.Ed.2d 249, 260-63 (1989).

The Court, however, disagrees with the Magistrate Judge's characterization of Metro Schools' choice of location for the Tulip Grove Elementary School as "creating the danger" that injured Mr. Lewellen. The construction plans, which Metro Schools approved, called for the removal of the open conductor. Had the

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the construction plans, which called for the removal of the open conductor, Metro Schools deferred to the architect to supervise construction, and it deferred to the general contractor to attend to work-site safety.

The Court recognizes that constitutional duties may not be contracted out to third parties. *See West v. Atkins*, 487 U.S. 42, 56, 108 S.Ct. 2250, 2259, 101 L.Ed.2d 40, 54 (1988). However, the Supreme Court now explicitly has held that a city has no constitutional duty to provide its workers with a safe workplace. *See Collins*, __ U.S. at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 274. Thus, the defendants' reliance on the general contractor to attend to workplace safety did not implicate the United States Constitution, and any failure by the general contractor in this regard did not create a constitutional violation by the defendants. Even if Metro Schools had assumed the responsibility for worker safety, under the construction contract or otherwise, its failure to carry out this responsibility still would not amount to a constitutional violation because the defendants never had a constitutional duty to provide a safe workplace.

The most serious allegation of wrongdoing on the part of the defendants is that Metro Schools caused a delay in the removal of the conductor by insisting that classes at DuPont Middle School

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removal of the conductor been carried out in an orderly manner, the location of the Tulip Grove Elementary School would not have been unusually dangerous to workers.

Of course, merely causing a school to be built does not "create danger," in a constitutional sense. There are many dangers inherent in any construction project, yet municipalities are not liable under Section 1983 for all the accidents that may befall workers on a public works construction site.

not be interrupted, despite its knowledge that the continued presence of the conductor was dangerous to workers at the site. Although the actions of Metro Schools may not have been prudent, whether they violated the Constitution is another matter.

In reaching his conclusion that the plaintiff has put forward sufficient evidence of wrongdoing by the defendants to withstand the defendants' motion for summary judgment, the Magistrate Judge relied primarily on *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989) and *Nishiyama v. Dickson County*, 814 F.2d 27 (6th Cir. 1987) (en banc). *See* Report and Recommendation at 33-36. The Court, however, believes that the Magistrate Judge erred in his reliance on these cases.

In *Ruge*, the Eighth Circuit Court of Appeals reversed the lower court's granting of the defendant city's motion to dismiss a Section 1983 claim. The plaintiff alleged that the death of her son, who worked for the city's sewer department, had been caused by the city's "deliberate policy of not shoring up ditches and then *requiring employees to work in them* without warning them of the dangers." *Ruge*, 892 F.2d at 739 (emphasis added). The Court of Appeals held that "where the state abuses its governmental power through an alleged policy of *actively placing* a person into a situation of known danger the Constitution proscribes and limits such action." *Id.* at 741 (emphasis added).

The difference between the situations in *Ruge* and the instant case is obvious. In the former case, the city allegedly ordered the plaintiff's decedent to work in life-threatening circumstances. In the latter case, the city merely refused to take actions that would protect workers when it had knowledge they were exposed to danger. *See DeShaney v. Winnebago County*, 489 U.S. 189, 195-97, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249, 258-59 (1989)

(holding that the Due Process Clause does not require a state to come to the aid of those in danger).

Nevertheless, the Magistrate Judge attached particular significance to the *Ruge* court's statement that "a policy, [whereby] a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act." *See* Report and Recommendation at 34 (quoting *Ruge*, 892 F.2d at 742). In light of the Supreme Court's opinion in *Collins*, however, the Court of Appeals' statement is irrelevant to the instant case. Indeed, the defendants may have been "deliberately indifferent" to workplace safety at Tulip Grove, but the Supreme Court has now explicitly held that the failure of a city to provide safe working conditions does not violate the Constitution. *Collins*, __ U.S. at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 274. Moreover, the Supreme Court disapproved of using "deliberate indifference" as the standard for determining whether a constitutional violation has been committed. See *Id.* at __, 112 S.Ct at 1068, 117 L.Ed.2d at 272-73. Rather, the Court limited the use of that standard to the secondary question of whether a municipality itself may be held liable for constitutional violations committed by its agents. *Id.*

The Sixth Circuit's opinion in *Nishiyama v. Dickson County, supra*, also fails to support the Magistrate Judge's determination that summary judgment should not be granted for the defendants. In *Nishiyama*, the parents of a young woman brought a Section 1983 suit against Dickson County, Tennessee, after their daughter was murdered by a prisoner in the custody of the county sheriff's department. The sheriff had put the prisoner on "trusty" status and given him unsupervised use of a fully-equipped patrol car, despite the sheriff's knowledge that the prisoner was a dangerous

convicted felon with a history of assaulting young women. On the night of the murder, the sheriff was notified that a Dickson County patrol car had been pulling over motorists in a neighboring county, but he made no effort to investigate. In reviewing the defendants' motion to dismiss the civil rights claim against them, the court held that "the allegation in the present complaint of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power [and] . . . to state a claim for a substantive due process violation that would withstand a motion to dismiss." *Id.* at 282.

Since deciding *Nishiyama*, however, the Court of Appeals has been careful to limit its holding to the sort of outrageous conduct present in that case. In *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), the Court stated:

> *Nishiyama* did not hold that a mere allegation of gross negligence or aggravated negligence would always be enough to withstand a motion to dismiss. . . . The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power.

Id. at 1106.

The actions of the defendants in the instant case simply do not rise to the level of outrageous conduct present in *Nishiyama*. Thus, *Nishiyama* does not support the Magistrate Judge's conclusion that summary judgment should not be granted in this case.

The Court also does not find that the defendants' dickering over $600.00 in overtime costs "evinces arbitrariness" sufficient to support the plaintiff's claim of a constitutional violation. *Cf.* Report and Recommendation at 33. The words of the Supreme Court in *Collins* are especially relevant here:

> Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based upon a rational decisionmaking process that takes account of competing social, political, and economic forces. *Cf. Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986). Decisions concerning the allocation of resources to individual programs . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. 341, 350, 96 S.Ct 2074, 2080, 48 L.Ed.2d 684, 693 (1976).

Collins, __ U.S. at __, 112 S.Ct. at 1070, 117 L.Ed.2d at 275.

Metro Schools' decision not to pay the overtime costs that would have protected workers like Bobby Lewellen was ill-advised and stupid. But it was not arbitrary in a constitutional sense. As the decisionmaker responsible for constructing and administering the public schools, Metro Schools is entitled to

decide how much money to spend building its schools and how much to spend operating them. If it chooses to curtail construction costs by not paying overtime and to spend more on books or teachers' salaries, it may do so without a post-hoc auditing by the federal courts. In an opinion cited by the Supreme Court in *Collins*, the Seventh Circuit Court of Appeals described the situation as follows:

> Governments regularly sacrifice safety for other things. A city may decide to spend more money on parks or education and less on police, even though its officials know that the expenditure on police would reduce the cost of crime by more than the expenditure on the police. It may do this without answering in damages to people subsequently mugged in the parks.

Walker v. Rowe, 791 F.2d 507, 510 (7th Cir. 1986).

Anyone acquainted with the tragedy that befell Bobby Lewellen would want him to receive compensation for the suffering he has endured. Nevertheless, there are many tragedies that do not violate the Due Process Clause of the Fourteenth Amendment, and this is one of them. Again, the words of the Supreme Court in *Collins* are especially appropriate here:

> The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of

> certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to insure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

Collins, __ U.S. at __, 112 S.Ct. at 1069, 117 L.Ed.2d at 274 (quotation marks and citations omitted).

III. CONCLUSION

For the reasons stated above, the Report and Recommendation of the Magistrate Judge is rejected. The defendants' objections are sustained. Accordingly, the defendants' motion for summary judgment shall be granted.

An appropriate order shall be entered.

s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
11-30-94

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION DATED NOVEMBER 30, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-89-0735
Judge Higgins

BOBBY JOE LEWELLEN

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.

ORDER

In accordance with the memorandum contemporaneously entered, the Report and Recommendation (entered June 17, 1992; Docket Entry No. 130) of the Magistrate Judge is rejected. The defendants' objections (filed July 17, 1992; Docket Entry No. 132) are sustained.

Accordingly, the defendants' motion (filed May 3, 1991; Docket Entry No. 87) for summary judgment is granted, and this action is dismissed with prejudice.

The entry of this order shall constitute the judgment in this action.

It is so ORDERED.

s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
11-30-92

APPENDIX E — REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION DATED JUNE 17, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:89-0735
Judge Higgins

BOBBY JOE LEWELLEN

Plaintiff

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.

Defendants

and

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and the ELECTRIC POWER BOARD OF THE METROPOLITAN GOVERNMENT

Third-party Plaintiffs

v.

J. HAROLD SHANKLE COMPANY, INC., et al.

Third-party Defendants

Appendix E

REPORT AND RECOMMENDATION

I. INTRODUCTION

This civil action was referred to the Magistrate Judge by the Honorable Thomas A. Higgins, District Judge by Order entered August 19, 1991 (Docket Entry No. 108). Pursuant to 28 U.S.C. § 636(b)(1)(B), the Magistrate was directed to consider defendants' motion, submit proposed findings of fact and make recommendations as to disposition of the defendants' motion for summary judgment (Docket Entry No. 87).

Plaintiff Bobby Joe Lewellen (Lewellen), a Tennessee citizen, filed this action under 42 U.S.C § 1983 against defendants Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") and the Metropolitan Board of Public Education for Nashville and Davidson County ("Metro School Board"). Lewellen worked for the J. Harold Shankle Construction Co. ("Shankle") as a carpenter and was injured on December 19, 1988, while working on the roof of the Metro School Board building at issue. Lewellen contends that the defendants deprived him of his substantive due process right under the Fourteenth Amendment not to be deprived of life, liberty or property without due process by their knowing and deliberate indifference to his safety by exposing him to a power line at his workplace.

In 1988, the Metro School Board developed plans and specifications for a new school building. These plans required construction of the building under a high voltage electric power line, which line was to be removed. The plans, however, set no specific time for the power line's removal. For various reasons discussed below, the power line was not removed before

construction began on the building's roof. In sum, the Metro School Board insisted that the power line be removed on a holiday or weekend. Nashville Electric Service ("NES") refused to remove the line on a holiday or weekend unless it was paid overtime. The Metro School Board and the building contractors argued about which party was required to pay for overtime under the contract. Finally, the parties agreed to remove the power line on December 29, 1988.

On December 19th, Lewellen was carrying a metal bar on the construction site and the bar came into contact with the overhead high voltage electric power line. Upon contact, Lewellen received an electric shock which resulted in the loss of his right leg, part of his left foot, and various fingers, in addition to severe scars. Lewellen's action seeks recovery for those injuries.

In response to Lewellen's complaint, Metro and its Electric Power Board then filed a third-party complaint against J.H. Shankle Company, Inc. ("Shankle"), the prime contractor on this school project, and C.E.C. Electrical Contractors, Inc. ("CEC"), a subcontractor on this project, seeking indemnity from these entities due to their negligence that caused Lewellen's injuries. (Docket Entry No. 10).

Lewellen later amended his Complaint to assert claims against Shankle and CEC, as well as to add as defendants, NES, Ted Wynne and Associates, Inc. ("Wynne"), the consulting engineer and Hayes and Associates/Architects, Inc. ("Hayes"), the architects for this project, asserting claims of gross negligence. (Docket Entry Nos. 18 and 68). Those disputes have been settled, and only Lewellen's claims against the Metro defendants remain. (Docket Entry No. 81).

Appendix E

Metro and the Metro School Board move for summary judgment under Rule 56, Fed. R. Civ. P., contending that: (1) Lewellen was never in custody or detained by defendants, thereby they owed no duties to him with respect to his safety; (2) any duty owed to Lewellen was owed by the building contractors and not the Metro defendants; (3) any fault on the Metro defendants' part was merely negligence and, thus, does not state a constitutional violation required for a § 1983 action; and (4) a constitutional violation must result from abuse of a specific governmental power, for which there has been no showing here. (Docket Entry Nos. 87, 88 and 115).

Lewellen responds that: (1) The Fourteenth Amendment guarantees freedom from bodily harm and of personal security; (2) defendants created this danger and acted with deliberate indifference to Lewellen's right to be free from bodily harm; (3) this deliberate indifference was the proximate cause of Lewellen's injuries; (4) the defendants had a duty under state law to remove or warn of dangers posed by the power line; (5) defendants could not delegate their duly to ensure Lewellen's safety; and (6) material issues of fact preclude summary judgment (Docket Entry Nos. 105 and 116).

For the reasons set forth below, the Magistrate recommends that the defendants' motion for summary judgment be denied. Lewellen has a substantive due process right under the Fourteenth Amendment to be free from bodily harm. There is sufficient proof here for a reasonable person to conclude that the defendants violated this right when they were aware of a clear and obvious danger at this worksite. The Metro defendants created the danger when they planned construction of the new school building under the exposed power line. Their inaction to eliminate that danger could be construed to reflect deliberate or

grossly reckless disregard of the safety of persons who were working at that location. There is evidence that defendants knew of the proximity of the power line to the roof of the school building, but allowed construction to continue and delayed removal of the power line. The cost for removal of this exposed power line was $600.00. There is likewise sufficient proof for a jury to find that the proximate cause of Lewellen's injury was the Metro defendants' awareness of the danger and their control over that danger. It was Metro's policy in this construction project not to correct such matters from its own resources. In the Magistrate Judge's view, such evidence creates material issues of fact that preclude summary judgment.

II. REVIEW OF THE EVIDENCE[1]

In 1987, the Metro School Board decided to build the Tulip Grove Elementary School. (Docket Entry No. 98, Stipulation at 7). Once the Metro School Board decides to build a school, the Planning and Construction department then draws the plans, solicits bids for construction, and oversees the construction. *Id.* The members of this department included Everett Henry, its director, John Workman, its supervisor of architectural services,

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1. Upon a motion for summary judgment the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988) (unpublished opinion). As will be discussed *infra*, under recent Supreme Court holdings, upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for a directed verdict, *Anderson v. Liberty Lobby*, 477 U.S. 242, 24752, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986). Because of the material factual disputes, this section does not represent findings of fact within the meaning of Rule 56(d).

and Roy Weeks, its superintendent of school plant construction. *Id.*

The plans and specifications for Tulip Grove were developed in the winter and spring of 1988. *Id.* The Metro School Board decided to build Tulip Grove next to Metro School's Dupont Middle School. *Id.* This site required that Tulip Grove's east and northeast wings be built under an open conductor, an electric power line, running to Dupont. *Id.* While the plans for Tulip Grove required that the open conductor be moved during the construction of the school, no specific time was set to remove the conductor. *Id.* at 9-10.

John Workman is an assistant to the superintendent of school planning and construction for the Metro School Board. (Docket Entry No. 97, Workman deposition, at 3). As a Metro School Board employee, it is Workman's "basic responsibility to review the designs from the architects" *Id.* at 23. When reviewing the architect's plans for the Tulip Grove project, Workman noted that the architect had planned to move certain power lines because of the new building's location.

> At the time of that review, I remember noting that the architect had made provisions for the power lines to be moved because of the location of the new building. There were notes on the drawings to that effect. I don't have any written record of saying anything to the architect other than I personally noted that it was on the drawings.

Id. at 23-24. Architects for the Metro School Board provide a "set of the proposed contract documents at about 95 percent

completion for us to review for compliance with our instructions, for an opportunity for us to see what is going to be there and maybe given helpful suggestions for improvements." *Id.* at 24. In essence, the Metro School Board performs a "final review" on proposed construction decisions. *Id.*

As part of the Tulip Grove project, Workman sent a typed copy of his review to Hayes, the architect, but kept his own handwritten copy. *Id.* This handwritten copy is dated April 20, 1988. (Docket Entry No. 96, Exhibit 32 thereto, Tulip Grove review, at 1). This review appears to have been fairly detailed. For instance, there is a note to "Delete chalkboard from Itinerant staff 119." *Id.* at 2. There is also a reference to Dupont's power line and its necessary removal.

> Need to ensure that Contractor does not leave existing school building without power when relocating primary power and phone lines[.] A couple of days may be acceptable if during non-occupied time.

Id. at 7.

By contract, the Metro School Board required the contractor "to do whatever coordination is necessary in scheduling to effect the relocation." (Docket Entry No. 97 at 26). According to Workman, the plans themselves show the height of the proposed Tulip Grove building but not the height of the Dupont power line. *Id.* at 27. On the other hand, Workman knew that the applicable codes prohibited construction under a live electrical wire, but the Metro School Board expected the contractor to comply with these codes.

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> As I understand, the electrical codes that are applicable in this area prohibit construction under live electrical wires. The contractor building anything that we hire a contractor to build is held responsible for complying with codes. It would be expected that his scheduling of his work would, in compliance with those codes, involve moving the power lines before constructing the building.
>
> It would be an assumption on my part, but I would think a reasonable one, to expect that with the obvious need to move power lines because they were over the top of where a building was to be constructed, that a contractor would schedule that to be done before construction of that area began.

Id. at 33.

The Metro School Board reviewed and approved the final plans and drawings, contract documents and bid documents before letting the project for bids. (Docket Entry No. 98 at 10). After Shankle was awarded the contract, there was a preconstruction conference including representatives of the Board. Hayes, the architect for the Tulip Grove project, Wynne, the consulting engineer for the Tulip Grove project, and Shankle. *Id.* at 10-11. During this conference, the conference recognized that the conductor needed to be relocated before Dupont opened in the fall of 1988. *Id.* at 11. At the time of the conference, Duty Electric Co. ("Duty"), was the electrical subcontractor. *Id.* In late July or early August of 1988, C.E.C. replaced Duty as the electrical subcontractor. *Id.*

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Randy Leath is the founder and co-owner of C.E.C. Electrical Contractors, Inc. (Docket Entry No. 94, Leath deposition, at 23). Leath essentially runs the day-to-day operations of C.E.C. *Id.* at 32. C.E.C. had done electrical work on other buildings before working on Tulip Grove. *See id.* at 25-26. Leath understood that it was the electrical contractor's duty to coordinate the relocation of the existing power lines at Tulip Grove. *See id.* at 39-40. He was not told by either Hayes or Wynne to move the power lines before the fall of 1988. *Id.* at 40. Leath generally understood that the conductor would become more dangerous as construction brought the building closer to the conductor.

> Q. And you knew, as a master electrician, that if the building were built up under those lines and you got in too close proximity to the lines, that that would be a dangerous situation, isn't that correct, sir?
>
> A. Yes, sir.

Id. at 44. Leath took his directions from Shankle. *Id.* at 45. On the other hand, Hayes and Wynne required C.E.C. to use more expensive material than what C.E.C. had been installing in order to comply with the contract. *See id.* at 46-48.

Because the conductor was a power line, Nashville Electric Service ("NES") had to be the entity to move the conductor to a safer location. (Docket Entry No. 98 at 10). The Metro defendants contend that its agreement with Shankle required that Shankle or the electrical subcontractor would have the conductor moved and then pay NES for any charges related to the movement of the conductor. *Id.* While the conductor was being moved, Dupont would be without electricity for six to eight hours. *Id.*

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As the director of school plant planning and construction, Everett Henry ("Henry") had the principal responsibility for the construction of each school, including the development, implementation of policies and oversight of the construction.

> Q. As the director in that position, were you the person that was responsible, on behalf of the School Board, for the construction of each school?
>
> A. Yes.
>
> Q. Are you the person on behalf of the School Board, that would have come up with guidelines or the procedures by which you and your staff handled and monitored and administered the construction of each school?
>
> A. Yes.

Docket Entry No. 95, Henry deposition, at 56. On the other hand, according to Workman, "All communications between the owner and the contractor goes through the architect so that the architect can maintain a knowledge of the status of the contract since he is the owner's representative trying to administer the contract." (Docket Entry No. 97 at 116).

According to Henry, the Metro School Board relied on the architect "to be our agent on this contract, to be sure it's carried out as the contract calls for." (Docket Entry No. 95 at 98). Henry never observed any safety violations at the Tulip Grove project, nor was he advised of any safety violations. *Id.* at 88-89. Roy Weeks, a Metro School Board employee, would inspect the Tulip

Grove project in order to determine "the progress of the job and to check requests for payment against the amount of work done." *Id.* at 26. To ensure that construction was in accordance with the contract was a "minor part of [Weeks'] job. The major portion of that work is designated to the architect." *Id.* Generally, a Metro School Board employee would visit the Tulip Grove project every week. *Id.* at 27. Weeks attended job meetings on the site with officials from Shankle, the prime contractor, and major subcontractors for the project. (Docket Entry No. 98, Stipulation, at 9). As part of his regular inspection of the site, Weeks would walk through the construction, review its progress, approve pay requests and make sure that construction was proceeding. *Id.*

On July 11, 1988, Hayes, the architect, issued a field report that the grading contractor was waiting for the existing power line to be moved before he could complete his work at the east and northeast wings of Tulip Grove. *Id.* In July, 1988, Shankle asked Metro Schools to coordinate the pole, power removal and changeover with NES. *Id.* On July 15, 1988, Shankle informed Hayes that excavation at Tulip Grove could not be completed until NES moved the overhead conductor. *Id.* Shankle also informed Hayes that it could not move the conductor without Metro School's written consent. *Id.*

On July 18, 1988, Henry asked Rusty Ramser of NES to move the existing power line. *Id.* at 12. On July 19, 1988, NES authorized its Commercial Industrial Department to build a new line to Dupont. *Id.* at 15. On August 1, 1988, Henry asked Ramser to install new electrical service at Tulip Grove. *Id.* at p. 12. The installation of such service would have required removal of the conductor. *Id.* At this time, neither Shankle nor C.E.C. gave any safety precautions or warnings of danger for persons working under the conductor. *Id.*

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At a meeting on August 8, 1988 on the project, the Metro School Board, Hayes and Wynne expressed concerns about the electrical work. *Id.* There were no determinations made, however, concerning the construction of Tulip Grove under the conductor, the lack of efforts to move the conductor, or the failure to warn or safeguard workers working under the conductor. *Id.* at 12-13. Throughout the construction work, the Metro School Board would not allow the open conductor to be moved or neutralized without its knowledge. *Id.* at 13.

On August 25, 1988, NES set four poles for the movement of the conductor. *Id.* at p. 15. On August 26, 1988, the line was installed for the first four poles. *Id.* One pole was set on October 25, 1988. *Id.* An underground conduit run was to be from Dupont to this pole and would have replaced the open conductor. *Id.* Another line between these first four poles and the pole set on October 25, 1988, was installed on November 1, 1988. *Id.*

In October, 1988, C.E.C. began the work necessary to allow the transfer of electricity and removal of the conductor. *Id.* at 15-16. C.E.C. completed this work on November 1, 1988. *Id.* at 16. On November 2, 1988, Randy Leath of C.E.C. contacted Ron Davidson of NES in order to coordinate the changeover of electrical service. *Id.* Leath notified NES that the Metro School Board required five days notice before any interruption of the service. *Id.* Leath also stated that he wished NES to move the existing power lines as soon as possible because they were "beginning to impair" the scheduled construction of Tulip Grove. *Id.* at 16-17.

After Leath's discussion with NES and throughout November, 1988, there was a series of contacts between NES, the Metro School Board, Shankle and C.E.C. concerning the Metro

School Board's requirements as to the power shutdown necessary for the removal of the conductor. *Id.* at 17. The Metro School Board insisted that the power shutdown occur when Dupont was not in session. *Id.* NES insisted that it be paid overtime if the work was done on a weekend or holiday. *Id.* The estimated overtime cost was $600 to $1000. *Id.*

The Metro School Board refused to pay this overtime cost and insisted that the contract required Shankle to pay for overtime costs.

> Q. Now, is there anywhere in the contract, and this may also have been asked and answered, that told the contractor or the electrical subcontractor, when they were bidding on the project, that this had to be done on the weekend rather than during the week?
>
> A. I think you asked me that question the other day and I told you I didn't specifically recall, but I would be amazed if we didn't cover that in the pre-bid or pre-construction conference.
>
> Q. My question wasn't whether you covered it in the pre-bid or pre-construction conferences, but whether or not it was included in any of the contract documents?
>
> A. Yes, sir, the wording, I believe, is any fees or costs.

> Q. But is there anywhere in there where you tell them that those fees and costs will have to include weekend work because the Metro School Board won't let the change-overs occur while school is in process?
>
> MR. KENNEDY: Object to the form. Go ahead and answer it.
>
> A. When I answer this question I'm going to have to hedge a little, because we do let them do work during the day, but not when children are in the school when there is an air conditioned building with no windows. Children cannot stay in that building. There is nothing, I don't think, specifically there that refers to weekends, midnight or any other time. It just says "all" fees and costs.

(Docket Entry No. 95, Henry deposition, at 105-06).

Henry also testified that it is the Metro School Board's policy and custom to refuse automatically to pay for such costs.

> Q. And it's the policy or custom of the School Board, and I believe you testified to this, not to pay any of those costs after the letting of the contract?
>
> A. Yes, sir.
>
> Q. If in this case NES requested overtime pay for moving the lines on the weekend, it

> would have been the policy and the custom of the School Board to just automatically refuse that payment?
>
> MR. KENNEDY: Object to the form.
>
> A. Yes, sir. I feel like I must say something.
>
> Q. Go ahead.
>
> A. NES and the School Board have a very, very good working policy with each other and we never had any problems.

Id. at 106-07.

The Metro School Board insisted that Shankle had to pay this cost. (Docket Entry No. 98, Stipulation, at 17). Shankle and C.E.C. refused to pay this cost. *Id.* NES refused to transfer the electric service without payment for overtime. *Id.* Finally, on November 21, 1988, it was agreed that the conductor would be removed on December 29, 1988, during the Metro School Board's Christmas holidays. *Id.* On December 14, 1988, the Metro School Board notified NES that the power transfer had been approved for that day. *Id.*

Roy Weeks was superintendent of construction for Metro Schools. (Docket Entry No. 90, Weeks deposition, at 6). Weeks was the Metro School Board's representative at the Tulip Grove project on a regular basis. *Id.* at 22. He followed the Tulip Grove project "all the way through." *Id.* Indeed, he was present when Lewellen was electrocuted. *Id.* at 37. Weeks had believed that the conductor would be removed before the fall of 1988. *Id.* at 43.

When the removal did not occur, he expected the conductor to be removed during the Thanksgiving holidays for November, 1988. *Id.* at 44. When Weeks visited the Tulip Grove project, he could observe the construction which occurred under the conductor.

> Q. Did you know, each time you would go out on the site up to Thanksgiving 1988, that the line was still there?
>
> A. I knew it was there.
>
> Q. Knew it was still energized?
>
> A. Yeah.
>
> Q. [Kn]ew they were working under the line?
>
> A. I did not know they were working under the line, no.
>
> Q. Well, sir, you saw them —
>
> A. Well, I saw the building, the slab and the walls go up, so —
>
> Q. And so you knew they had to be up under the —
>
> A. Right.
>
> Q. They had to be working up under it to see the slab being poured ?

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A. Right.

Q. See grading work done under the lines?

A. Right.

Q. The masonry walls go up?

A. Right.

Q. See the brick walls go up?

A. Right.

Q. See the steel underdecking being put on the roof?

A. Right.

Q. You could see that by just looking?

A. Right.

Q. It didn't take a close inspection of any type to see that?

A. No.

Q. You could hardly be on the project and not see that that was occurring; isn't that correct?

A. No. It wasn't brought to my attention each time I visited the job, though.

> Q. Yes, sir, I understand, but you could hardly drive — anybody could hardly drive out on that project and not see that the school was being built up under those lines?
>
> A. That's correct.

Id at 44-45. Indeed, on the day of Lewellen's electrocution, "practically all the decking had been put on that school up to that point." *Id.* at 37. The electrocution itself "blew the transformer" and ended Dupont's power for the day, requiring school to be dismissed. *Id.* at 42.

On December 19, 1988 Lewellen worked for Shankle as a carpenter at the Tulip Grove site. (Docket Entry No. 98, at 1). He was deemed to be a good, dependable worker. *Id.* At that time, the 23,900 volt open conductor was hanging down to within seven feet of the roof of the building. *Id.* at 3. The close proximity of the conductor to the roof was in violation of statutory and safety code requirements at that time. *Id.* The 23,900 volt open conductor was inherently dangerous to those persons working at Tulip Grove who worked near the conductor. *Id*.

While working on the roof, Lewellen was handling a piece of steel bridging which came into contact with or near the conductor. *Id.* Lewellen then received an electrical shock from the conductor. *Id.* at 2. After being shocked, Lewellen was rushed to Vanderbilt University Medical Center. *Id.* at 4. As a result of electrical burns, Lewellen has lost his right leg below the knee, his left great toe and an adjacent tarsal bone, his right index finger, part of his right ring finger, and his left index finger. *Id.* at 6. He has also lost much of the use of his hands. *Id.* In addition, the electrical burns have caused numerous disfiguring scars which

have required skin grafts and surgeries on his upper extremities, lower left extremity, chest and abdomen. *Id.*

The Metro School Board has no policy or procedure for remedying safety violations on its own work sites, other than to defer to the architect.

> Q. Mr. Workman testified, and you tell me if you agree or disagree with this, that the Metro Board of Education didn't have any policy or custom or procedure by which they would come onto a project and remedy safety violations by a contractor that were contrary to the requirements of the contract documents. Is that correct?
>
> A. We don't have a policy. That's normally left up to the architect.
>
> Q. So the Metropolitan Board of Education just had no policy or procedure —
>
> A. Not to my knowledge.
>
> Q. — or custom in that regard, is that correct?
>
> A. Not to my knowledge.
>
> Q. So that would be correct, then, to your knowledge?
>
> A. Yes.

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(Docket Entry No. 95, Henry deposition, at 54-55).

III. CONCLUSIONS OF LAW

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1989). Moreover, "district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte,* so long as the opposing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Accord, Routman v. Automatic Data Processing, Inc,.* 873 F.2d 970, 971 (6th Cir. 1989).

In *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

> requirement is that there be no *genuine* issue of *material* fact.
>
> *As to materiality the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.* Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in the original and added in part).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Celotex, 477 U.S. at 323 (emphasis added).

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As the Court of Appeals explained, "[t]he moving party bears the burden of satisfying Rule 56(c) standards." *Martin v. Kelly,* 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden is to show 'clearly and convincingly' the absence of any genuine issues of material fact." *Sims v. Memphis Processors, Inc.,* 926 F.2d 524, 526 (6th Cir. 1991). "So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," the nonmoving party then "must set forth the specific facts showing that there is a genuine issue for trial." *Emmons v. McLaughlin,* 891 F.2d 351, 353 (6th Cir. 1989) (quoting *Celotex* and Rule 56(c)).

Once the moving party meets its initial burden, the Court of Appeals warned that "[t]he respondent must address more than a scintilla of evidence to overcome the motions [and] . . . must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Street v. J.C. Bradford & Co.,* 886 F.2d 1472 (6th Cir. 1989). Moreover, the Court of Appeals explained that

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

Street, 886 F.2d at 1480. See also *Hutt v. Gibson Fiber Glass Products,* No. 89-5731 (6th Cir. filed September 19, 1990) ("A court deciding a motion for summary judgment must determine

'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." quoting *Liberty Lobby.*)

"A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establish a genuine issue of material fact for trial." *InterRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989) *cert. denied* 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990).

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, *summary judgment will not lie if the dispute about a material fact is 'genuine' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.*

* * *

> Progressing to the specific issue in this case, we are convinced that *the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial*

> *on the merits.* If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, *the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff of the evidence presented.* The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict — 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'*

477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d at 211-212, 214 (citation omitted and emphasis added).

It is likewise true that "[I]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been said that: 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute...'" *Bohn Aluminum & Brass Corp. v. Storm King Corp.*,

303 F.2d 425, 427 (6th Cir. 1962) (citation omitted). As the Court of Appeals stated, "all facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion." *Duchon v. Cajon Company,* 791 F.2d. 43, 46 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988) (unpublished opinion) (citation omitted). Particularly close scrutiny, however, is required to be given to motions for summary judgment in a civil rights case. *Tarlton v. Meharry Medical College,* 717 F.2d 1523, 1535 (6th Cir. 1984); *Azar v. Conley,* 456 F.2d 1382, 1384, n. 1 (6th Cir. 1972).

The Magistrate has distilled from these collective holdings four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts.

As an initial matter, the Magistrate considers whether Lewellen has a claim actionable under § 1983 against Metro and whether Lewellen has presented sufficient proof of a constitutional violation. The Metro defendants contend first, that Lewellen's claim represents an isolated act that is legally insufficient for a § 1983 claim against a municipality. The Metro defendants next contend that, at most, they committed a personal injury tort and that such torts are not actionable as constitutional violations under § 1983. Lewellen responds that the acts here are the result of a Metro policy and that he has a substantive due process right under the Fourteenth Amendment to be free of

bodily harm. Lewellen further contends that evidence of the defendants' deliberate indifference to the danger of which Metro had actual knowledge and was involved in creating, is sufficient to prove his substantive due process claim under the Fourteenth Amendment.

The Supreme Court has stated the basic elements for a Section 1983 claim as follows:

> . . . in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981).

In certain circumstances, a municipality is a person that can be sued under Section 1983, namely if

> [the employee's] action . . . implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers[;]
>
> [There is] official municipal policy of some nature[; or]

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> [The] execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . . .

Monell v. Department of Social Services, 436 U.S. 658, 690, 691, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611, 635, 638 (1978).

The *Monell* Court held that "only deprivations visited pursuant to municipal 'custom' or 'policy' could lead to municipal liability" under Section 1983. *Oklahoma City v. Tuttle.* 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791, 801 (1985). As to the quantum of proof required to establish liability of local governmental units under *Monell,* the plurality opinion of four Justices in *Tuttle* stated:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Tuttle, 471 U.S. at 823-24, 105 S.Ct. 2427, 85 L.Ed.2d al 804 (footnote omitted).

Later, however, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court, in another plurality opinion, held that the single decision of an authorized municipal decisionmaker, the district attorney, may be considered to set municipal policy and thereby be the basis of municipal liability under § 1983.

> If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government Policy' as that term is commonly understood. *More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.* To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

475 U.S. at 481 (emphasis added).

In a third plurality opinion, it was stated that whether a single official has policymaking authority for a municipality is a question of state law for the court. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-26, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). As to the factors to consider, if state law is unclear, the plurality opinion in *Praprotnik* states:

> When an official's discretionary decisions are

> constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Praprotnik, 485 U.S. at 127. *Accord, Johnson v. Hardin County*, 908 F.2d 1280 (6th Cir. 1990) (when state law indicates county fiscal court sets jail policy, jailer is not final policymaker for county).

Here, the Metro School Board is the designated decisionmaker for Metro on school matters. The Metro School Board reviewed and approved the final plans and drawings for the building at issue. (Docket Entry No. 98 at 10). There was a series of contacts between the Metro School Board, its contractors and NES as to when the conductor would be removed. *Id.* at 17. The Metro School Board representative also inspected the work site regularly. *Id.* at 9. In the Magistrate's view, this evidence is sufficient to support a finding that Lewellen's injuries are the result of Metro's designated policymaker's decisions.

With respect to the existence of a municipal policy, Lewellen has submitted proof that the Metro School Board has a policy or custom to refuse automatically to pay overtime costs for

electrical work and to leave the responsibility for safety at one of its construction sites entirely to the general contractor or architect. Henry, director of school plant planning and construction for the Metro School Board, has testified that he was responsible on behalf of the Metro School Board for the construction of each school and for the guidelines or procedures by which he or his staff would monitor and administer construction. (Docket Entry No. 95, Henry deposition, at 56). Furthermore, he has testified that it is the policy and custom of the Metro School Board to refuse automatically to pay for overtime costs. *Id.* at 106. Moreover, the Metro School Board had no policy for remedying safety violations on its own work sites. *Id.* at 54. The Magistrate Judge concludes that this is sufficient proof on the existence of a custom or policy to support a § 1983 claim as to the Metro defendants.

In addition to the requirement of a policy decisionmaker and policy or custom, there is a specific evidentiary burden to satisfy in order to impose § 1983 liability. In *City of Canton, Ohio v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Court addressed the requisite proof for a Section 1983 claim against a municipality for physical injuries allegedly caused by inadequate training of its police officers.

> [The] first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. . . ."
>
> . . . We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train

amounts to deliberate indifference to the rights of persons with whom the police come into contact.

* * *

"[A] municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. . . .

* * *

[F]or liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? . . .

489 U.S. at 385, 388-391 (1989) (footnotes omitted).

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There is evidence that the conductor hung over the Tulip Grove site in violation of statutory and safety code requirements and that the Metro School Board's policy of refusal to pay overtime costs contributed to the delay in the conductor's removal. *See* Docket Entry No. 98, Stipulation, at 3, 17. The cost of removal was about $600.00. These facts, coupled with the proof of the Metro School Board's policy, are sufficient to create a material factual issue on whether defendants' policies, acts and omissions were a proximate cause of Lewellen's injuries.

In this regard, other Courts of Appeals have held that a municipality's failure to act can constitute the proximate cause of a victim's injuries under § 1983. In *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), the city had suspended a police officer as being mentally unfit for duty. *Id.* at 1512. Although the city ordered the officer to surrender his gun and ammunition, the city "made no attempt to recover [the officer's] service revolver or the ammunition it had issued to him." *Id.* The officer subsequently shot and killed an ordinary citizen. *Id.* at 1513. The Court of Appeals for the Seventh Circuit held that the officer was no longer acting under color of state law after his suspension. *See id.* at 1518-19. On the other hand, plaintiff also argued that the state's failure to recover the officer's gun and ammunition was the result of an inadequate municipal policy for disarming unfit officers.

In ruling that the district court's granting of summary judgment was error, the Court of Appeals described the plaintiff's theory against the municipality as follows:

> [Plaintiff] has alleged a municipal policy of inadequate procedures regarding the recovery of a deadly weapon and ammunition from an officer placed on medical leave as mentally unfit for duty. He also has alleged

> that the failure to promulgate adequate procedures constituted "deliberate indifference" to the rights of the decedent and was the cause of the decedent's death in deprivation of his constitutional rights. On a municipal liability claim, the City policy itself must cause the constitutional deprivation. Therefore, the municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the "color of law" requirement under § 1983. In short, under this theory of liability, [plaintiff] contends that the City's policy of allowing a deranged police officer to retain his service revolver and bullets is the state action that deprived him of his life. Consequently, the City is not entitled to judgment on the ground that it did not act under color of state law.

Id. at 1519-20 (citation and footnotes omitted).

In the omitted footnote, the *Gibson* court noted that other courts have found that a custom or policy of reckless indifference is sufficient to impose liability on the city, unlike this Circuit. *Gibson* 910 F.2d 1520 n. 16, citing *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987).

Accordingly, Lewellen's proof is sufficient to preclude summary judgment for the Metro defendants as to the causation requirement for municipal liability. This conclusion renders it unnecessary to address Metro's alternative theory that causation can only be proven when there is a "special relationship" between the state and the victim.

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As to whether Lewellen has established a constitutional violation, § 1983 is available to enforce specific federal rights. In *Wood v. Strickland,* 420 U.S. 308, 326, 95 S.Ct. 992, 1003, 43 L.Ed.2D 214, 227-28 (1975), the Supreme Court emphasized that:"§ 1983 was not intended to be a vehicle for federal court corrections of errors in the exercise of that discretion [of state officials] which do not rise to the level of violations of *specific constitutional guarantees.*" (Emphasis added). The Court of Appeals has stated that "Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac,* 906 F.2D 220, 223 (6th Cir. 1990).

As to the specific constitutional right here, the Supreme Court in *Collins v. City of Harker Heights,* __ U.S. __ 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) held that the substantive due process principles of the Fourteenth Amendment can apply to Lewellen's type of claim. In light of the Supreme Court's granting of certiorari in *Collins,* the Magistrate Judge recommended that a ruling on the present motion be stayed pending the Supreme Court's opinion (Docket Entry No. 117). The Court adopted this recommendation and stayed further proceedings (Docket Entry No. 120). After the Supreme Court issued its opinion, the Court reopened this case and directed the Magistrate Judge to proceed under the prior Order of Reference (Docket Entry No. 124). Supplemental briefs were submitted on this question. (Docket Entry Nos. 126 and 127).

In *Collins,* a municipal employee died while working in the sewer system. The decedent's spouse alleged that the city was on notice as to the danger from working in the sewer system but systematically and deliberately failed to provide safety equipment, training or instructions. 916 F.2d at 285. The district

court dismissed the complaint under Rule 12(b)(6), Fed. R. Civ. P., finding no constitutional violation. 916 F.2d at 285-86.

The Court of Appeals for the Fifth Circuit affirmed dismissal, holding that "to predicate liability under section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of state law." *Id.* at 288. The Court of Appeals then held that a municipality's negligence as an employer to a voluntary employee could not be the basis of a § 1983 action.

> The City acted in this case in a role essentially indistinguishable from the role of a private employer; accordingly, we cannot view the City's failure to redress the patent but possibly severe defects in [the decedent's] workplace as an abuse of government power. [The decedent's] association with [his workplace] is not alleged to have been any less voluntary than his relationship with a private employer would have been. This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state, nor are state representatives alleged to have violated the special obligation of government to refrain from intentional violations of constitutional rights.

916 F.2d at 288.

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The Court of Appeals for the Fifth Circuit was aware of a contrary holding in *Ruge v. City of Bellevue,* 892 F.2d 738 (8th Cir. 1989). Indeed, the Court of Appeals quoted the language from *Ruge* which held that a municipality was liable if it "*actively pursued* conduct which was deliberately indifferent to the constitutional rights of its citizens. . . ." *Id.* at 290. The Court of Appeals noted that such language "might compel finding here that the alleged municipal policy is an abuse of government authority or, stated differently, conduct that was of a 'uniquely government character,' sufficient to preclude Rule 12(b)(6) dismissal." *Id.* at 291. Nevertheless, the Court of Appeals rejected this holding as irreconcilable with Fifth Circuit precedent. *See id.* at 290-91. The Supreme Court in *Collins* specifically noted that it granted certiorari in order to resolve the conflict between the Fifth Circuit and the Eighth Circuit in *Ruge*, 112 S.Ct. at 1065.

The Supreme Court began in *Collins,* by rejecting the Fifth Circuit's requirement of the abuse of a specific governmental power as a necessary element of this Fourteenth Amendment claim.

> Our cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation. Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law. More importantly, the statute does not draw any distinction

> between abusive and nonabusive federal violations.

Id. (citations omitted).

Although the Court of Appeals for the Fifth Circuit had largely based its holding on the fact that the decedent was a government employee, the Supreme Court did not consider this fact to be determinative. *Id.* The Supreme Court noted one situation in which the Fifth Circuit analysis would be inapplicable, and another in which it would bar potentially meritorious claims.

> On the one hand, if the city had pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury to one who inadvertently stepped into an open manhole, the Court of Appeals' holding would not speak to this situation at all, although it would seem that a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner. On the other hand, a logical application of the holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, or because of his or her gender. The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the

> government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections. *Neither the fact that petitioner's decedent was a Government employee nor the characterization of the city's deliberate indifference to his safety as something other than an 'abuse of governmental power' is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.*

Id. at 1065-66 (emphasis added and citations omitted).

The Supreme Court then considered the standards for municipal liability under § 1983. *See id.* at 1066-67. The Supreme Court first emphasized that municipal responsibility was a separate question from whether a constitutional violation had occurred.

> Our purpose in citing these cases is to emphasized the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred. It was necessary to analyze whether execution of a municipal policy inflicted the injury in these cases because, unlike ordinary tort litigation, the doctrine of *respondeat superior* was inapplicable. The city is not vicariously liable under § 1983 for the constitutional torts of its

> agents: It is only liable when it can be fairly said that the city itself is the wrongdoer.

Id. at 1067.

Because of the *Collins* petitioner's heavy reliance on that case, 112 S.Ct. at 1067, the Supreme Court then addressed its earlier holding in *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 419 (1989), on the acts or omissions of the municipality required for § 1983 liability. As discussed *supra*, *Canton* held that a municipality could be held liable for constitutional violations caused by its deliberate indifference in failing to train its employees. 112 S.Ct. at 1067. The Supreme Court explained that *Canton* "addressed only the question whether the constitutional deprivation was attributable to a municipal policy or custom," assuming that a constitutional violation had occurred. 112 S.Ct. at 1067. The Court noted that not all harm-causing municipal policies were actionable, although the policy itself did not have to be unconstitutional.

> We did not suggest that all harm-causing municipal policies are actionable under § 1983 or that all such policies are unconstitutional. Moreover, we rejected the city's argument that only unconstitutional policies can create municipal liability under the statute.

Id.

As to the precise nature of the constitutional right at issue, the Supreme Court found that the specific right here arose under the substantive component of the Due Process Clause of the

Fourteenth Amendment. *Id.* In a word, the *Collins* plaintiff alleged a Fourteenth Amendment right to be free from "certain government actions regardless of the fairness of the procedures used to implement them." *Id.* In defining the elements of this substantive due process claim, the Court explained and noted that

> A fair reading of the petitioner's complaint does not charge the city with a *wilful* violation of Collins' rights . . .
>
> "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. No decision of this Court before *Parratt* [*v. Taylor,* 451 U.S. 527 (1981)] supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and commonsense notion that the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the *arbitrary* exercise of the powers of government.' "

112 S.Ct. at 1068-1069 n. 16, (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) and omitting other citations) (emphasis added).

In sum, the municipal governmental act complained of must be a deliberate and wilful act that represents an arbitrary exercise of governmental power by the municipality. As the Supreme Court further elaborated,

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> *Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces.* Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions."

Id. at 1069-70 (emphasis added).

Given the potentially expansive nature of this Fourteenth Amendment right, the Court emphasized that enforcement of this right required caution and the Courts must focus on the specific factual allegations of the complaint.

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we

> are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her husband of that right.

Id. at 1068.

In determining this question, the Supreme Court began by defining what does not meet the constitutional standards for this Fourteenth Amendment claim in this context. First, the Fourteenth Amendment claim does not include guaranteed minimum standards of safety in the workplace.

> Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" As we recognized in *DeShaney*,
>
> > "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without

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> 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text."
>
> * * *
>
> Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Id. at 1068, 1070 (citations omitted).

In a word, failure to obey a state law that would typically be a state tort claim is not the type of conduct that so "shocks the conscience" as to be actionable under the Fourteenth Amendment as an arbitrary exercise of governmental power.

The Supreme Court reasoned that although minimum standards of safety might be part of due process when a person was in the custody of the state, they were inapplicable when the person was a voluntary employee.

> Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented. It is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to

> take care of those who have already been deprived of their liberty. We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, for persons in mental institutions, for convicted felons, and for persons under arrest. The 'process' that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards. Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.

Id. at 1069-70 (citations omitted).

Finally, the Court considered whether State law imposing a duty to warn of dangers created a liberty interest which was protected by the Due Process Clause. Even assuming that state law created a liberty interest, the Court ruled that its deprivation was not arbitrary in the constitutional sense and could not be the basis of a § 1983 claim.

> We assume that the Act imposed a duty on the city to warn its sanitation employees about the dangers of noxious gases in the sewers and to provide safety training and protective equipment to minimize those dangers. We

> also assume, as petitioner argues, that the Act created an entitlement that qualifies as a "liberty interest" protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense. The reasons why the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life, apply a *fortiori* to the less significant liberty interest created by the Texas statute.

Id. at 1070-71 (footnote and citations omitted).

The Supreme Court then turned to the plaintiff's specific allegations presented in *Collins*. The Court noted that the *Collins* petitioner had alleged that "the City of Harker Heights was on notice of the dangers to which employees were exposed because [the decedent's] supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before [the decedent] began work at the City of Harker Heights." *Id.* at 1064 n. 1. The Court also assumed for the purpose of its decision that "the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents. . . ." *Id.* at 1068.

Upon review, the Court found no allegation in petitioner's complaint of a wilful violation of the decedent's rights or of the city's knowledge that the decedent had been ordered to take an action which posed a significant risk of harm.

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> A fair reading of petitioner's complaint does not charge the city with a wilful violation of Collins' rights. Petitioner does not claim that the city or any of its agents deliberately harmed her husband. In fact, *she does not even allege that* his supervisor instructed him to go into the sewer when *the supervisor knew or should have known that there was a significant risk that he would be injured.*

112 S.Ct. at 1068-69 (emphasis added).

Moreover, the *Collins* plaintiff only made "the more general allegation that the city deprived him of life and liberty by failing to provide a reasonably safe work environment" that the Court summarized as follows.

> Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's 'deliberate indifference' to Collins' safety was arbitrary Government action that must 'shock the conscience' of federal judges.

Id.

Under *Collins*, a claim based on the substantive due process component of the Fourteenth Amendment requires a heightened scrutiny of the specific facts upon which the claim rests for evidence of deliberate or wilful conduct that represents an arbitrary exercise of governmental power. *See id.*

As this standard is applied here, Lewellen contends that the Metro defendants here created the danger which injured him but took no actions to remove it. There are facts that show that the Metro School Board planned the school building at issue and knew that it would be built under an electric power line. (Docket Entry No. 1 at ¶ 25). This decision required the school to be built under a 23,900 volt open conductor supplying electricity to Dupont. (Docket Entry No. 98, Stipulation at 7). After awarding the contract but before construction, the Metro School Board recognized that the conductor would have to be moved before Dupont reopened in the fall of 1988. *Id.* at 10-11. For reasons unexplained in the record, the conductor was not removed before classes started.

The Metro School Board then insisted that the conductor not be moved while school was in session. *Id.* at 17. While being removed, power would have to be cut off to Dupont, the school next to the building under construction, but to do so, Dupont would have only had to be closed for a day. The Metro School Board and the building contractors then bickered over who should pay the overtime costs of $600.00 while construction began and continued on the roof of the new school building. *See id.* at 16-17. It is undisputed that the conductor would not be removed without the Metro School Board's consent. *See id.* at 11. In other words, the Metro School Board had the final say in when the conductor was to be removed. The Metro School Board also knew that this line would have to be removed for the safety of the workers at the site and for compliance with the relevant codes. (Docket Entry No. 1, Complaint, at ¶ 26). The Metro School Board then failed and refused to remove this power line prior to allowing workers on this construction site. *Id.* at ¶ 28.

In the Magistrate's view, these facts, when viewed in a light

most favorable to the plaintiff as is required by this motion, could be reasonably construed as evidence of deliberate indifference. Moreover, the exposure of workers to such a dangerous situation while arguing over who is to pay $600.00 in removal costs lacks the characteristics of a "rational decisionmaking process" and evinces arbitrariness by the Metro decisionmakers. The decision or lack of decision on cost of removal of the exposed power line under a contract does not appear to pose the type of major resource allocation decision to which the Court under *Collins*, must defer.

The Magistrate finds it instructive that although the Eighth Circuit's analysis in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), was a factor in granting review, 112 S.Ct. at 1065, the Supreme Court neither discussed nor rejected it. In *Ruge*, a municipal employee died while working in a fourteen foot ditch when the ditch collapsed upon him. 892 F.2d at 739. His estate then filed suit under § 1983, alleging that the municipality had "a deliberate policy of not shoring up ditches and then requiring employees to work in them without warning of the dangers." *Id.* This policy allegedly deprived the employee of his life "in violation of his fifth amendment right to substantive due process." *Id.*

The Court of Appeals for the Eighth Circuit reversed dismissal of the complaint under Rule 12(b)(6), Fed. R. Civ. P. *Ruge*, 892 F.2d at 742. The Court of Appeals held that, "where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action." *Id.* at 741. The Court of Appeals also held that "a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens,

would reach constitutional dimensions and be actionable under the Civil Rights Act." *Id.* at 742.

The Supreme Court did not address *Ruge's* holding that "a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act." 892 F.2d at 742. In *Ruge,* the digging of fourteen foot ditches coupled with the failure to shore up their walls was sufficient to allege a constitutional claim. *See Ruge,* 892 F.2d at 740. The Supreme Court neither questioned nor otherwise disapproved of the *Ruge* holding. Here, Metro "actively pursued" the course of conduct that caused workers to be exposed to this power line. In *Collins,* the petitioner did not allege that "[the decedent's] supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured." 112 S.Ct. at 1069. Here, Metro officials who had the deciding word on removal, permitted workers on this site when Metro had actual knowledge of the danger.

Ruge is not alone in finding liability for the violation of a substantive due process right. In fact, the Court of Appeals for the Sixth Circuit has found constitutional liability when the state had committed "gross negligence." An example of abusive government power occurred in *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (*reh'g en banc*), where the local sheriff allowed a prisoner to use an official patrol car without supervision on a regular basis. *Id.* at 279.

> We believe that the allegation in the present complaint of gross negligence on the part of the defendants was sufficient to charge

them with arbitrary use of government power. The complaint also pled that the result of this abuse of power was the death of Kathy Nishiyama. These allegations are sufficient to state a claim for a substantive due process violation that would withstand a motion to dismiss.

We acknowledge that the term "gross negligence" evades easy definition. In our view, *a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.* The defendants in this case intentionally gave [the prisoner] full unsupervised use of the officially marked and equipped patrol car. After they were notified that one of their patrol cars was stopping motorists in Montgomery County they intentionally failed even to investigate, much less attempt to recall [the prisoner] to jail.

The defendants should have appreciated the risk of permitting [the prisoner] to have unsupervised use of the Dickson County Sheriff's car. After they learned their patrol car was being used to stop motorists, the risk ceased to be speculative. Undeniably, there was a high probability of harm resulting from

> the fact that Hartman, a convicted felon entrusted to their custody, was allowed unsupervised use of an official patrol car. This is tragically underscored by the harm that eventually befell Kathy Nishiyama.
>
> The wanton disregard on the part of the defendants amounted to more than mere thoughtlessness. The defendants continued the practice of giving trusties use of patrol cars even after the murder. Only on the recommendation of the grand jury did the custom of the sheriff's department end. The defendants' actions cannot be attributed to simple inattention or carelessness. Rather, the defendants consciously established a policy of allowing trusties to have use of official patrol cars with a seeming indifference to the consequences. The defendants consciously and voluntarily failed to respond to the danger presented by Hartman's use of the car to stop motorists. We hold that such reckless indifference to the risk posed by their actions is sufficient to establish a violation of substantive due process under section 1983. It is particularly troubling when persons charged with ensuring public peace and order engender peril as a result of their outrageous conduct.

Id. at 282-83 (emphasis added). *See also, Freeman v. Ferguson,* 911 F.2d 52, 55 (8th Cir. 1990); *Gibson,* 910 F.2d at 1520 n. 16.

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Applying *Collins* and *Nishiyama,* the Magistrate concludes that Lewellen has a substantive due process right under the Due Process Clause of the Fourteenth Amendment to be free from bodily harm as a result of deliberate or wilful governmental action that represents a reckless disregard for his safety. For the reasons stated earlier on the finding of sufficient proof of a custom or policy to maintain this § 1983 action against Metro, the Magistrate concludes that if the facts are construed in a light most favorable to the plaintiff, the trier of fact could reasonably find that the Metro School Board deliberately "created" the danger which injured Lewellen and that but for the Metro School Board's decision to locate the new building under the conductor, Lewellen would not have been working in proximity to the conductor. Moreover, but for the Metro School Board's refusal to consent to the conductor's earlier removal, the conductor would have been removed before Lewellen suffered his injuries. Here, the Metro School Board's construction of a school building under an exposed conductor, coupled with its failure to remove that conductor is evidence in support of a finding that the Metro School Board deliberately created the danger which injured Lewellen. The Magistrate concludes that Lewellen has presented sufficient proof to establish Metro's acts and omissions as a proximate cause of his injuries.

To be sure, defendants presented proof that their actions were at most, merely negligent. There is expert testimony to the effect that the Metro School Board executed contracts with its contractors which are standard throughout the construction industry. (Docket Entry No. 89, Johnson affidavit, at 2). Such contracts typically assign all responsibility for worker safety to the general contractor. *Id.* at 3. Moreover, it is standard industry practice for an owner such as the Metro School Board to take no action with respect to worker safety. *See id.* at 3-4. In essence,

defendants contend that they did not act recklessly in endangering Lewellen. With respect to this proof, the Magistrate concludes that it only creates material factual disputes that preclude summary judgment.

Finally, defendants contend that it was Shankle's and C.E.C.'s responsibility to remove the conductor. The Magistrate notes, however, that constitutional duties cannot be contracted out to other parties. *See West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). Accordingly, defendants could not transfer their constitutional duties by contract to other parties. As for the duty imposed by state law, the Magistrate considers it to be inapposite. Section 1983 protects against "those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law." *Collins,* 112 S.Ct. at 1065.

IV. RECOMMENDATION

For the reasons stated above, the Magistrate Judge recommends that defendants' motion for summary judgment be denied. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn,* 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied,* 474 U.S. 1111 (1986).

Entered this 17th day of June, 1992.

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s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States Magistrate Judge

APPENDIX F — STIPULATION FILED MAY 17, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3089-0735

Judge Thomas A. Higgins

JURY DEMAND

BOBBY JOE LEWELLEN, *et ux.*,

Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and METROPOLITAN BOARD OF PUBLIC EDUCATION,

Defendants.

STIPULATION

The parties, by and through their counsel, have stipulated to the following admissions and/or facts:

This is an action for damages under 42 U.S.C. § 1983 and § 1988. The Court has original federal question jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 and § 1343. Pursuant to 28 U.S.C. § 1391, venue is proper in this district because the claims arose in the district and all the defendants reside in the district.

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Bobby Joe Lewellen is a citizen and resident of Kentucky. Mr. Lewellen was born on September 26, 1966. He has a high school education, but has not attended college. He is married to Ethel Lewellen and they have two young children.

On December 19, 1988, Mr. Lewellen was employed by J. Harold Shankle Co., Inc., as a carpenter. Mr. Lewellen's entire work history has been as a carpenter or a farm helper. At the time of his injuries, Mr. Lewellen was paid for his work as a carpenter for Shankle at the rate of $8.50 per hour. He was deemed to be a good, dependable worker. Bobby Joe Lewellen's life expectancy is 46.61 years. Dr. Walter B. Rogers, an economist and Professor of Economics and Finance at Middle Tennessee State University, has concluded based upon Bobby Joe Lewellen's average life expectancy, his employment and wage rate at the time of his injury and his future income projections, that the present value of Mr. Lewellen's loss of future earnings, based upon the most realistic calculation, after appropriate discounting, which Mr. Lewellen has lost as a result of his December 19, 1988, electrical injuries is $927,958. Copies of Dr. Rogers' resume and his report, which contains other estimated earnings, may also be submitted into evidence at the election of any party.

On December 19, 1988, while working for Shankle on the construction of the Tulip Grove Elementary School in Nashville, Tennessee, Mr. Lewellen was severely injured by an electrical shock from a 23,900 volt overhead "open conductor." This electrical incident occurred on the property of the Metropolitan Government of Nashville and Davidson County, Tennessee and/or the Metropolitan Board of Public Education.

The defendants sued by Mr. Lewellen are:

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The Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), a municipal corporation and the government of Nashville and Davidson County, Tennessee; and the Metropolitan Board of Public Education ("Metro Schools"), the owner/operator of the Tulip Grove Elementary School and the property on which it and the Dupont Middle School were located.

The following entities had involvement with the planning and/or construction of the Tulip Grove Elementary School or certain related matters:

1. The Electric Power Board of The Metropolitan Government of Nashville and Davidson County, Tennessee ("NES");

2. Hayes and Associates/Architects, Inc. ("Hayes"), a Tennessee corporation and the architect for the Tulip Grove Elementary School construction project;

3. Ted Wynne & Associates, Inc. ("Wynne"), a Tennessee corporation and the consulting engineer employed by Hayes and the Tulip Grove Elementary School project;

4. C.E.C. Electrical Contractors, Inc. ("C.E.C."), a Tennessee corporation and

the electrical subcontractor on the Tulip Grove Elementary School construction project, pursuant to an August 1, 1988, contract with J. Harold Shankle Co., Inc.; and

5. J. Harold Shankle Co., Inc. ("Shankle"), a Tennessee corporation and the general contractor, pursuant to a June 14, 1988, contract with Metro/Metro Schools, for the construction of the Tulip Grove Elementary School in Nashville.

The 23,900 volt open conductor injured Bobby Joe Lewellen when a piece of steel bridging that he was handling in the course of his work on the Tulip Grove Elementary School came in contact with or near the conductor. The open conductor was hanging down to within seven (7) feet of the roof of the building. The close proximity of the open conductor to the roof of the building was in violation of statutory and safety code requirements in force at the time. The 23,900 volt open conductor was inherently dangerous to those persons working on the Tulip Grove Elementary School, who worked in close proximity to the conductor.

After being injured, Mr. Lewellen was transported by ambulance to Vanderbilt University Medical Center. Following admission to Vanderbilt University Medical Center, Mr. Lewellen was found to have suffered deep, third degree electrical burns bilaterally to both hands and feet with severe muscle, nerve and tissue damage. He was found to have no sensation in the right lower extremity from his ankle to his toes and minimal sensation in the left lower extremity. His forearms were both tightly

swollen and tense. He had no significant radial, medial, or ulnar nerve function in either hand. On the day of admission, he was taken to the operating room for fasciotomy (surgical incision of the connective tissue) and escharotomy (removal of scabs from burns) of both forearms and upper extremities. He has failed to regain ulnar nerve function in either extremity.

During his lengthy hospitalization (almost two months initially), Mr. Lewellen underwent seven more operations including numerous debridements (removal of lacerated, devitalized and contaminated tissue, tendons and muscle) of the electrical burns to both hands and feet. Initially, his right fifth toe was amputated due to gangrene. Split thickness skin grafts were taken from his thighs and placed over the fasciotomy wounds on both forearms. His left great toe and an adjacent tarsal bone were amputated due to the fact that they were charred and blackened. Skin grafts were placed over the raw areas including his left foot, left palm, right foot, right ankle and left wrist. An inset chest flap was performed for his right palm. A free flap was obtained from his rectus abdominus muscle for the right foot, but the flap eventually failed and was removed surgically. His right leg finally had to be amputated below his knee.

Mr. Lewellen's daily treatment consisted of Physical Therapy, Occupational Therapy and regular burn care all of which caused him a great amount of pain.

Mr. Lewellen was discharged from Vanderbilt University Medical Center on February 13, 1989. However, he still required constant care due to his totally disabling injuries. In March, Mr. Lewellen was taken to Boston for approximately one week of intensive Occupational and Physical Therapy to attempt to alleviate his pain, to stretch and strengthen his muscles in all four

of his extremities and to increase his balance and endurance in preparation for his trying to walk. Upon his return to Middle Tennessee, Mr. Lewellen continued to receive Physical Therapy.

In April, 1989, Mr. Lewellen returned to Vanderbilt University Medical Center for surgery. His right index finger was amputated because both flexor tendons and digital nerves to that finger had been destroyed. At the same time, the left median nerve and flexor tendon were examined and were separated from the massive scar tissue.

Mr. Lewellen was admitted again to Vanderbilt University Medical Center on May 25, 1989 due to an infection of the right middle finger. At that time, Mr. Lewellen's right middle finger was insensate, and he was unable to extend the finger. He was treated with intravenous antibiotics and was released from the hospital on May 29, 1989. He has continued to be treated on a regular basis since that time undergoing other surgical treatments and his physicians have recommended other and further burn care and surgical procedures.

In brief summary as a result of his electrical burns, Bobby Joe Lewellen has lost his right leg below the knee, his left great toe and an adjacent tarsal bone, his right index finger, part of his right ring finger, and his left index finger. He has also lost much of the use of each of his hands and has numerous disfiguring scars from the electrical burns, skin grafts and surgeries on his upper extremities, his lower left extremity his chest and abdomen.

Dr. John B. Lynch, Professor and Chairman of the Department of Plastic Surgery at Vanderbilt has indicated that Mr. Lewellen has a permanent impairment rating of 100% due to the amputation of one leg, the severe injury to the ankle joint on

the other leg and the absence of median nerve sensation to both hands.

Additionally, Mr. Lewellen has been evaluated by Dr. B. A. MacDougal at the Trover Clinic in Kentucky, who assigned him the following permanent impairment ratings: 100% of the left hand, 96% of the right hand, and 22% of the left foot. Dr. MacDougal apparently did not assign Mr. Lewellen any impairment for the amputation of his right leg. Using AMA cumulative values, Dr. MacDougal noted that this represents greater than 100% permanent impairment of the whole body.

Mr. Lewellen has continually experienced pain and suffering as a result of his injuries and will do so for the remainder of his life. His medical and hospital records fully describe his injuries and will be produced at trial, together with the testimony of certain of his health care providers.

In 1987, Metro Schools determined to build the Tulip Grove School, together with six other schools during 1988 and 1989. Simultaneously, Metro/Metro Schools was also planning fourteen other school construction projects. When Metro Schools determines to build a school, it first obtains funding for the school, and then selects an architect to work on the school project. No architectural firm can handle more than one Metro Schools project at a time. After selection of an architect, a committee is appointed by Metro Schools for the planning stage for the school. This planning includes compiling of educational specifications, a determination of the number of classrooms and equipment necessary for the school, and the design of the school itself. The architect works with this committee and usually employs an educational planner to assist it in its work. The architect provides necessary engineering services for the mechanical, plumbing and electrical planning and design as part of his contract.

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The planning and construction department of Metro Schools is involved in the planning of the school, letting the bid for the construction, and overseeing the construction of the school. At all times material hereto, this department was staffed by Everett Henry, its director, John Workman, its supervisor of architectural services, and Roy Weeks, its superintendent of school plant construction. It had no other employees other than secretarial to fulfill these duties. Mr. Workman and Mr. Weeks reported directly to Mr. Henry. Mr. Henry is a licensed professional engineer and was then responsible for budgeting and planning new schools, directing the architect's work on each school, the design of the school, and carrying out the construction of the school. Mr. Workman has a Bachelor of Architects degree from the University of Tennessee, but is not a licensed architect. Mr. Workman's duties included the administration of construction contracts, design coordination and observation of construction for the new schools. On the Tulip Grove School, he assisted Mr. Roy Weeks on an as-needed basis in the performance of those duties. He and Mr. Weeks were the two persons for Metro Schools responsible for the administration of the construction contract and construction observation on the Tulip Grove project. Mr. Weeks was the person primarily responsible for that work. Mr. Weeks has a B.S. from Middle Tennessee State University. Until he became employed with Metro Schools in 1973, he worked generally as a sales person in the construction industry. Mr. Weeks and Mr. Henry have retired from their jobs at the Board since Mr. Lewellen's injury.

Construction of the Tulip Grove Elementary School was not started as early as planned because of delay in letting the contract for bid and Shankle did not have the time originally contemplated by Metro Schools to compete the job. The contract documents provided for a daily penalty if Shankle did not complete the job on time.

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As to the Tulip Grove job, Mr. Weeks' responsibility was to attend the job meetings on the project which usually included Shankle, his superintendent, and representatives of the major subcontractors, including C.E.C. As part of Mr. Weeks' inspection of the job site regularly he would walk through the construction, review it to see how far it had progressed, approve pay requests and make certain that the construction work was progressing.

Hayes was chosen as the architect on the Tulip Grove job. Hayes employed Wynne to provide mechanical, plumbing, electrical design, and field observation services for the Tulip Grove project throughout the construction of the school. Plans and specifications were developed for the Tulip Grove project in the winter and spring months of 1988. During the development of the plans, Metro Schools decided it would locate the school on the available land rather than purchase additional land. After some delay, Hayes, Wynne, and Metro Schools ultimately selected the site for the school. This site required that the east and northeast wings of the school be built under the open conductor running to its Dupont Middle School, which was in close proximity to the site of the Tulip Grove and on the same property. Hayes developed plans, drawings, and specifications for construction of the Tulip Grove site with assistance from Wynne as to the plumbing, electrical, and mechanical work.

These plans, drawings and specifications required that the open conductor be moved during the construction of the school. The documents did not specify any timetable for moving the open conductor in relation to the construction work on the project. The open conductor was to be moved by having NES set another series of the poles away from the Tulip Grove School and having underground service run from Dupont Middle School to the new

electrical line. Under the contract documents, the general contractor or the electrical subcontractor performing the electrical work on the project was to perform this work, and pay NES for any charges relating to the changeover of the power and movement of the overhead contractor. Any changeover of power would cause a six to eight hour loss of power to the Dupont Middle School.

Hayes prepared the contract and bid documents concerning the project. Metro Schools, through Mr. Henry and/or Mr. Workman, reviewed and approved the final plans and drawings, the contract documents, and bid documents prior to letting the job for bid. The job was let for bid in May, 1988. The total appropriation of the job was $4,750,000.00. The estimated project costs were as follows:

Construction	$ 4,159,152.00
Architect's Fee	245,000.00
Topographic & Soil - Soil Surveys	12,000.00
Furniture and Equipment	160,000.00
Contingency	66,648.00
TOTAL	$ 4,642,800.00

Shankle was the low bidder and was awarded the contract as general contractor. Shankle's total bid was $4,033,082.00.

After Shankle was awarded the Tulip Grove contract, a pre-construction conference was attended by persons for Metro Schools, Hayes, Wynne and Shankle. During the conference, it was recognized the the relocation of the open conductor needed to be completed prior to the Dupont Middle School opening in the

fall of 1988. C.E.C. was not the electrical subcontractor on the project at the time of this pre-construction conference. At that time, Duty Electric Company was the electrical subcontractor. Shortly after the meeting, Duty had to resign as the electrical subcontractor because of its financial problems. In late July or early August, C.E.C. became the electrical subcontractor on the project. The open conductor was not moved or neutralized in June, July, August, September, October or November 1988. It was neutralized and/or moved on December 29, 1988.

On July 11, 1988, Hayes issued a field report recognizing that the grading contractor was awaiting removal of the existing power line before he could complete his work concerning the east and northeast classroom wings of the Tulip Grove School.

In July, Shankle called Metro Schools to ask it to coordinate the pole and power removal and changeover with NES. On July 15, 1988, Shankle advised Hayes by letter that excavation on the Tulip Grove project could not be completed until NES moved the overhead conductor. Shankle further advised Hayes that NES had informed Shankle that it was unable to move the open conductor without Metro Schools written request. Excavation work continued to completion without removal of the open conductor.

On July 18, 1988, Mr. Henry wrote Rusty Ramser of Nashville Electric Service asking that NES move the existing power line.

On August 1, 1988, Everett Henry again wrote Rusty Ramser of Nashville Electric Service and requested the installation of the new service for the Tulip Grove School. The installation of such services would have required the removal of the overhead conductor.

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On August 8, 1988, Wynne reported several problem areas concerning the electrical portions of the Tulip Grove job. None of these areas had anything to do with the movement of the overhead conductor, though as of that date no effort had been made to move it.

During August, 1988, neither Shankle nor C.E.C. performed any work related to moving the overhead conductor nor took any steps concerning safety precautions or warnings of danger for persons working under the open conductor. Through August, 1988, one hundred percent (100%) of the site work on the project was completed, together with sixty-five percent (65%) of the masonry work, fifty-eight percent (58%) of plumbing, exterior and under-slab rough-in and ten percent (10%) of electrical rough-in.

On August 8, 1988, a job meeting was held in which Metro Schools, Hayes, and Wynne expressed concern about certain of the electrical work. However, neither Metro Schools, Hayes, nor Wynne made any determinations concerning the construction of the school under the overhead conductor or the fact that no efforts were being made to move the open conductor or to safeguard or warn the workers working under the conductor.

Hayes wrote Shankle on August 8, 1988, and instructed Shankle to perform certain work on the job as directed by the engineer. Even though Hayes and Wynne were giving directions concerning the work on the project, they gave none from July through December concerning the open conductor.

On August 10, 1988, there was a meeting concerning certain of the electrical work. During this meeting it was pointed out that NES had spotted the pole necessary for the movement of the

overhead conductor approximately 280 feet from the building. It was indicated in that meeting that the position of the proposed pole appeared to be beyond what would be normally contemplated for the underground conduit run to allow removal of the overhead conductor.

As a result of the length of this underground run, C.E.C. requested a change order for an additional 230 feet of underground primary line to supply the Dupont Middle School with electricity. The open conductor from the pole to the Dupont Middle School was functioning for the use and benefit of Metro Schools. Throughout the construction work on the Tulip Grove Elementary School, Metro Schools would not allow the open conductor to be moved or neutralized without its knowledge. C.E.C.'s request for a change order was rejected by Hayes after consultation with Wynne and Metro Schools on the basis that such change order was not an extra cost item per the contract documents.

Hayes and/or Wynne had the authority to execute Field Orders which interpreted the contract documents and ordered minor changes in the work that did not change the contract sum or contract time. On August 23, 1988, they issued such a Field Order. This order was based on the State Fire Marshal's review of the work and Shankle was instructed to incorporate certain clarifications or changes in its work on the project. At no time material hereto did Hayes or Wynne ever issue a field order concerning moving the open conductor or providing any safety precautions or warnings concerning the conductor.

In September a series of letters and conversations occurred between Shankle, C.E.C., Hayes and/or Wynne which culminated in a meeting between these parties and Ron Davidson

and Robert Boleyjack of NES on September 26, 1988. The purpose of this meeting was to discuss the placement of the utility pole necessary for the movement of the overhead conductor. A new pole position was provided which reduced to approximately 120 feet the required run of underground conduit. Up until the time of this meeting, no work related to the moving of the overhead conductor had been performed or any safety precautions taken for, or any warning given to those persons working under the overhead conductor. In the meeting, it was also determined that C.E.C. was to coordinate with NES concerning the method for laying the underground conduit necessary for the moving of the overhead conductor and that C.E.C. should expediently do this work to avoid potential conflicts with construction of the Tulip Grove School and the existing overhead conductor.

NES had previously been involved with the removal of the overhead conductor. The Tulip Grove job was first discussed with NES's Commercial Industrial Department in the spring of 1988. NES gave authorization to build the new line to its Commercial Industrial Department on July 19, 1988. The Engineering Department of NES designed the line and released it to its construction maintenance division. Four poles were set by NES on August 25, 1988, to accomplish the movement of the open conductor. One pole was set on October 25, 1988. The underground conduit run from Dupont Middle School was to be to this pole and would replace the open conductor which injured Mr. Lewellen. The line was installed on August 26, 1988, for the first four poles. An additional span of line between the existing four poles and the pole set on October 25, 1988, was installed on November 1, 1988.

Hayes recognized in its September 30, 1988, review and

report to Metro Schools of the application for payments that through that date one hundred percent (100%) of the site work had been completed on the project. Eighty-nine percent (89%) of the concrete work had been completed on the project. Eighty-four percent (84%) of the masonry work had been completed on the project. Twenty-six percent (26%) of the roofing and waterproofing had been completed on the project. Eighty-five percent (85%) of the plumbing, exterior and underslab rough-in had been completed on the project and thirty-one percent (31%) of the electrical rough-in. In October, C.E.C. finally began to perform the work necessary to allow the transfer of the electrical power and removal of the open conductor.

It took C.E.C. the entire month of October to complete the work necessary for the removal of the open conductor. By letter dated October 28, 1988, to Metro Schools, Hayes recognized in its review and report to Metro Schools that ninety-eight percent (98%) of the concrete work had been completed and ninety-five percent (95%) of the masonry block work, sixty percent (60%) of the masonry brick work, sixty percent (60%) of the roofing work, ninety-two percent (92%) of the exterior and underslab rough-in plumbing, forty-four percent (44%) of the electrical rough-in, and twenty-four percent (24%) of the structural steel erection. Hayes further stated that the project was running smoothly and was approximately forty-three percent (43%) complete. Hayes indicated that the roofing was scheduled to begin in November and the building was to be dried in by the end of December. Hayes indicated that that schedule could be held and Shankle should have no problem completing the school on schedule.

On or about November 1, 1988, C.E.C. completed the work necessary for the changeover of the power and removal of the overhead conductor. On or about November 2, 1988, Randy

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Leath of C.E.C. contacted Ron Davidson of NES to coordinate the changeover of the electrical service. In this conversation and subsequent follow-up written materials, Mr. Leath notified NES that Metro Schools required five (5) days prior notice before any interruption of the service. He also stated that he wished NES would move the existing overhead power lines as soon as possible because they were "beginning to impair" the scheduled construction of the new building.

After this call, through the first twenty-one (21) days of November, there were a series of contacts between NES, Metro Schools, Shankle, and C.E.C. concerning the requirement by Metro Schools that the power shutdown be accomplished at a time when the Dupont Middle School was not in session and NES's requirement that it be paid overtime if the job was to be done on a weekend or holiday. The estimated overtime cost was $600 to $1,000. Metro Schools refused to pay this overtime cost. Metro Schools took the position that the overtime payment was Shankle's responsibility. Shankle refused to pay this overtime cost. C.E.C. refused to pay this overtime cost. NES refused to accomplish the transfer without payment of the overtime cost. Finally, on November 21, 1988, it was agreed that the transfer and removal of the open conductor would occur during Metro Schools' Christmas holiday on December 29, 1988, the estimated time for dry-in of the building. On December 14, 1988, NES received notice from Metro Schools that the clearance had been approved by Metro Schools for that day. NES personnel were alerted for the clearance on that day. Bobby Lewellen was electrocuted on December 19, 1988.

At the end of the month of November, Hayes determined in its review and report to Metro Schools that one-hundred percent (100%) of the concrete on the project had been complete, ninety-

five percent (95%) of the masonry block was complete, eighty-four percent (84%) of the masonry brick was complete, sixty-eight percent (68%) of the structural steel erection was complete, ninety percent (90%) of the roofing was complete, forty-five percent (45%) of the electrical rough-in, and seventy-one percent (71%) of the electrical main service was complete. Hayes further indicated that Shankle should have no problem in completing the school as scheduled in July of 1989.

Photographs and measurements taken by NES on December 19, 1988, after Mr. Lewellen's electrocution show that the building, including the steel structure, and the roofing, had been built directly under the open conductor to within approximately seven feet (7') of the conductor.

Immediately prior to Mr. Lewellen's electrocution, there was a meeting between Metro Schools, Hayes, Wynne, Shankle and C.E.C. No mention was made at the meeting of the open conductor.

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Appendix F

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APPENDIX G — RELEVANT STATUTE INVOLVED

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 94-931

In The

Supreme Court of the United States

October Term, 1994

BOBBY JOE LEWELLYN,

Petitioner,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY AND METROPOLITAN BOARD OF PUBLIC EDUCATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals erred in holding that a non-intentional tort by governmental actors cannot constitute a cause of action under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

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STATEMENT OF THE CASE

Petitioner's statement of the case is accurate in most respects. However, at certain points the petitioner either drifts into argument beyond the fair implication of the facts stated in Appendix F to his Petition, or fails to present a balanced statement of the proof.

On pages 7, 10 and 11 of the Statement of the Case, petitioner repeatedly argues that Metro Schools made no effort to halt construction of the Tulip Grove Elementary School Building, despite a contractual right to do so and despite knowledge that an open electrical conductor to the adjacent school was open and active. Petitioner makes argumentative characterizations that Metro acquiesced in and encouraged construction under the open conductor. **Pet. at 7.** Petitioner also asserts that Metro Schools had full knowledge that the roofing was taking place within seven (7) feet of the conductor. **Pet. at 9-10.**

As stated in the stipulation of the parties, **Pet.,** Appendix F, and in the factual findings of the Sixth Circuit Court of Appeals and the U.S. District Court, there is no dispute that Metro Schools was aware that Tulip Grove Elementary School was under construction before the overhead electrical conductor was relocated as called for in the contract documents. Petitioner has omitted the undisputed fact, noted by the Sixth Circuit, **Pet.,** Appendix B at 6a, that Metro Schools relied upon its architect to monitor safety conditions. Further, nowhere in the stipulation or in the record is it stated that Metro Schools was aware that the electrical conductor was only seven (7) feet from the roof of Tulip Grove Elementary

School prior to Mr. Lewellen's accident. The only balanced reading of the facts is that although it could readily be seen that the roofing was under the conductor, it was not known that the roof was only 7 feet below it.

Petitioner references provisions of the contract between Metro Schools and the general contractor regarding Metro's right to stop work and withhold payment for defective work or failure to pay third parties. **Pet. at 9.** The petitioner omitted reference to the provisions which made the general contractor generally responsible for job safety, which provisions were mentioned in the opinions of the U.S. District Court, (**Pet.**, Appendix C at 22a) and the Sixth Circuit Court. (**Pet.**, Appendix B at 6a).

Finally, the petitioner overstates and mischaracterizes the position and policy of Metro Schools with respect to removal of the electrical conductor and changeover to the new conductor at the adjacent Two Rivers Middle School. In the equivalent of a jury speech, petitioner states that Metro Schools would "not allow" the conductor to be neutralized and moved, despite knowledge of danger to the workers. (**Pet. at 9-10**). As stated in the findings of the Sixth Circuit (**Pet.**, Appendix B at 5a) and the U.S. District Court (**Pet.**, Appendix F at 106a and 107a), a dispute arose around the issue of payment for the changeover of electric power from the old conductor, which passed over a portion of the roof of the Tulip Grove School, to the new conductor, which avoided the roof. The changeover would take at least six to eight hours, necessitating the cut-off of power to Dupont School. Metro Schools refused to permit closure of the school on a regular school day. In order to perform the

changeover on a weekend or holiday, Nashville Electric Service demanded payment of overtime costs for its workers, the cost of which was estimated to be between $600.00 and $1,000.00. Despite its contractual obligation to pay utility charges, the general contractor refused to pay that cost. Metro Schools refused to pay due to the contractual provisions which reflected its policy not to pay additional cost for utility work. Unfortunately, that dispute was not resolved until the agreement was reached that the changeover would be done during school Christmas holidays, on December 29, 1988.

ARGUMENT

This Court should refuse to grant certiorari in this case. The Sixth Circuit, in its consideration of the facts of the case, correctly applied the principles established by this Court in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 109 S.Ct. 988, 103 L.Ed.2d 249 (1989); and *Collins v. City of Harker Heights*, 503 U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Petitioner complains at length that the Sixth Circuit improperly limited the effect of its earlier ruling in *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987), but respondents contend that regardless of whether this Court agrees with the Sixth Circuit's assessment of *Nishiyama*, that court properly disposed of petitioner's appeal in the instant case.

Petitioner begins his argument by properly stating the analytical framework for determining whether a plaintiff has properly stated a case under 42 U.S.C. § 1983

and the due process provision of the Fourteenth Amendment. However, the petition soon goes astray in its assertions that Mr. Lewellen's cause of action, as alleged and fleshed out by the facts and stipulations, can survive that analysis.

As this Court made clear in *Collins, id.*, a two-prong analysis must be made to determine if a claim has been alleged against a municipality. First, a court must decide whether a constitutional violation led to plaintiff's injury; and second, whether the municipality is responsible. *Collins,* 117 L.Ed.2d at 270. The District Court and the Sixth Circuit properly employed that analysis and determined that Mr. Lewellen could not prove that his injuries resulted from a constitutional violation. Therefore, there was no need to consider the second question of municipal responsibility.

In reaching its decision, the Sixth Circuit emphasized that the guarantee of substantive due process of law, applicable through the Fourteenth Amendment, protects individuals from the arbitrary exercise of governmental authority. (Appendix B at 9a). *Albright v. Oliver,* 510 U.S. ___, 114 S.Ct. ___, 127 L.Ed.2d 114 (1994). Intentional arbitrary acts clearly come within the proscription of the Constitution, while negligent acts are outside its scope. *Daniels v. Williams. Id.*

As respondents understand it, the petitioner argues that this Court should grant certiorari so that he can argue that the instant case should be controlled by the principle enunciated by the Sixth Circuit in *Nishiyama, id.*, specifically that gross negligence on the part of governmental officials can rise to a violation of substantive due

process. In effect, petitioner asks this Court to make *Nishiyama* the law of the land. Respondents contend that such a step is ill-advised and unnecessary.

Petitioner characterizes the Sixth Circuit's opinion in this case as an "abrupt departure" from its prior holdings and at odds with the majority view of the federal circuits. (Pt. at 14) That argument is wrong in both respects.

In subsequent decisions, the Sixth Circuit had carefully limited its holding in *Nishiyama* to the type of outrageous conduct exhibited in that case. As the court stated in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987):

> The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power.

827 F.2d at 1106.

The Sixth Circuit has further delineated limits on liability for outrageous conduct in *Bradenburg v. Cureton*, 882 F.2d 211, 214-215 (6th Cir. 1989) (negligent preparation for violent arrest); *Braley v. City of Pontiac*, 906 F.2d 220, 226-227 (6th Cir. 1990) (malicious prosecution); *Cassady v. Tackett*, 938 F.2d 693, 697-698 (6th Cir. 1991) (threat to kill by jailer). Thus, prior to its decision in the instant case, the Sixth Circuit recognized that its analysis that gross negligence can be tantamount to intentional,

arbitrary action was not to be construed as broadly applicable. *Nobles v. Brown*, 985 F.2d 235, 238 n.1 (6th Cir. 1992).[1]

Petitioner's claim that the majority of federal circuits have supported the *Nishiyama* rule on gross negligence is likewise misguided, relying as it does on *Woodrum v. Woodward County*, 866 F.2d 1121 (9th Cir. 1989) – a case decided prior to *DeShaney* or *Collins*. Indeed, federal circuit cases decided since *DeShaney* and/or *Collins* have tended to find that intentional arbitrary action rather than non-action or unintentional action is minimally required to state a cause of action in non-custodial settings. *See Harris v. District of Columbia*, 932 F.2d 10, 14-16 (D.C. Cir. 1989); *Monahan v. Dorchester Counselling Center, Inc.*, 961 F.2d 987, 990-994 (1st Cir. 1992); *Pitchell v. Cullan*, 13 F.3d 545, 549 (2d Cir. 1994); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994); *Weller v. Dept. of Soc. Serv. for Baltimore*, 901 F.2d 387, 391-392 (4th Cir. 1990); *Salas v. Carpenter*, 980 F.2d 299, 307-308 (5th Cir. 1992); *Donovan v. City of Milwaukee*, 17 F.3d 944, 955 (7th Cir. 1994); and *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 733-734 (8th Cir. 1993).

When viewed in the light of subsequent decisions, the Sixth Circuit's ruling in *Nishiyama v. Dickson County, Id.*, is best understood as a case in which the defendant's actions shocks the conscience of the court, *see Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952),

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[1] Even if Lewellen represents an "abrupt" departure from prior law, that is precisely the action that lower courts should take in response to principles of law established by the U.S. Supreme Court.

rather than a decision which adopted a formula for subsequent use through which non-intentional actions could lead to liability. Indeed, the actions of the defendants in *Nishiyama*, including the unsupervised permissive use of an official county sheriff's vehicle by a dangerous felon, coupled with ignoring reports that he was stopping unsuspecting motorists, could be found to bear the earmarks of arbitrary use of governmental authority. In any event, the facts in that case are quite different than those present in the instant case, and a decision on the facts of the ruling in *Nishiyama*, is not necessarily relevant to this Court's determination of whether it should grant certiorari.

Petitioner next contends that the Sixth Circuit simply misconstrued the holding in *Collins v. City of Harker Heights*, and that *Collins* actually supports his case. Petitioner bases that argument on its reading that *Collins* does not preclude liability under 42 U.S.C. § 1983, based upon gross negligence. Petitioner further claims that he has made the allegations that the plaintiff failed to make in *Collins*. Specifically, petitioner argues that he has alleged that intentional acts by Metro Schools violated his rights.

Petitioner's reliance upon his pleadings is misplaced for two reasons. First, when it considers a Rule 56 motion in a case that has progressed past the pleadings stage, and which includes a record with material evidence bearing on the allegations, a court must examine that evidence, as well as the pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-255, 106 S.Ct. 2505, 91 L.Ed.2d 202, 214-216 (1986). In view of the substantive law of this case as established by *Collins, id.*, a court must examine the proof to determine whether a recognized constitutionally-

guaranteed right has been violated. *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. 248.

Second, these conclusory allegations fall well short of what this Court required in *Collins,* which is an allegation tantamount to "deliberate harm." 503 U.S. at ___, 112 S.Ct. at 1068-69, 117 L.Ed.2d at 273. Nowhere in the relevant allegations of the amended complaint can a factual predicate for any intention on the part of Metro Schools to cause deliberate harm to Mr. Lewellen be found.

As the District Court and the Sixth Circuit stated, the substantive law of the instant case is established by *Collins v. City of Harker Heights, supra; DeShaney v. Winnebago Soc. Serv., supra;* and *Daniels v. Williams, supra.* As in *Collins,* the issue in this case is whether petitioner can show that he received injury because of a constitutional violation.

The plaintiff's claim in *Collins* was characterized as a deprivation of Mr. Collins' life and liberty by failing to provide him with a reasonably safe work place. This Court stated that plaintiff's theory that a city has a constitutionally-guaranteed obligation to provide its employees with a certain minimal level of safety and security was unprecedented and without support in prior Supreme Court case law. The Fourteenth Amendment's substantive due process clause has heretofore been construed as a limitation on a government's authority to act in an oppressive manner or to abuse its power, but not as an instrument to generally impose an affirmative obligation to guarantee any minimal level of safety and security. *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d

677 (1986); *DeShaney v. Winnebago Soc. Serv. Id.* The obligation to assure safety and security is only imposed for the benefit of persons who have been deprived of liberty by a government and who find themselves in government custody of one type or the other. This guarantee was not available to Mr. Collins since acceptance of an offer of employment cannot be characterized as deprivation of liberty. *Collins* at 112 S.Ct. at 1070, 117 L.Ed.2d at 275.

This Court dismissed plaintiff's allegation of arbitrary municipal action by stating that even if the city failed to adequately train its employees or warn them of a known risk of injury, that omission did not shock the court's conscience so as to be arbitrary in the constitutional sense. The decision regarding arbitrariness in the constitutional sense was founded upon its presumption that administration of programs by local governments involves a balance of policy choices and allocation of resources, particularly when it comes to such matters as the training of employees. Therefore, even if the city provided insufficient training, that failure was not the type of arbitrary action that implicates substantive due process of law. For the same reasons, this Court refused to raise the city's denial of a liberty interest created by the Texas OSHA statute to the level of a constitutional deprivation protected by the substantive due process clause. 503 U.S. at ___, 112 S.Ct. at 1070-71, 117 L.Ed.2d at 275-76.

The factual similarities between this case and *Collins* are clear. If anything, the City of Harker Heights was more blameworthy than Metro Schools because it directed its own employee into a dangerous sewer ditch without proper training and equipment. In contrast, the policies, and customs which the petitioner lists involve a

failure to take certain steps or use its governmental power to the fullest extent to protect workers employed by independent contractors, such as Mr. Lewellen, from the admittedly dangerous condition that was allowed to exist, by allowing construction to proceed too close to the uninsulated electric conductor. For example, Mr. Lewellen argues that Metro failed to closely monitor the construction site for electrical safety violations; that Metro tried to delegate that responsibility by contract; that Metro refused to close the adjacent school during a school week for electric changeover or make overtime payments to the electric service for weekend work; and that Metro failed to exercise its authority to stop work on the job so that the dangerous condition could be rectified. In essence, petitioner claimed that Metro did not provide a safe workplace. However, after *Collins, id.*, such claims cannot survive constitutional analysis.

Petitioner then argues that his claims are also based on arbitrary action. As the courts below noted, Metro Schools' actions cannot be called arbitrary in the constitutional sense. Petitioner's allegations and facts cannot, as a matter of law, rebut the presumption of reasonableness stated in *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986), and approved by the Supreme Court in *Collins, supra.* In fact, the stipulations (Appendix F) only reinforce that presumption. During 1988, Metro Schools was in the process of building seven (7) new schools and planning fourteen (14) others. Presumably, staff resources had to be allocated to certain functions, and intensive monitoring of job site safety was not one of those functions. Therefore, it was not arbitrary, in the constitutional sense, to assign

protection of worker safety to the general contractor, even if Tennessee law states the duty is non-delegable.

With respect to Metro's policies affecting electric service changeover, Metro maintains that they cannot be arbitrary in the constitutional sense. The school system's primary duty is to instruct students; thus, it simply cannot be arbitrary to refuse to allow electricity to be shut off during school hours. The proof is clear that a power shut-off of several hours was necessary to change the power lines, if all went well. Further, the duty to pay N.E.S.'s overtime charges was placed on the contractors and presumably was included in their bids. Refusal to, in effect, pay twice for the same work can hardly be arbitrary.

Further, by emphasizing the $600.00 to $1,000.00 cost of N.E.S.'s overtime, petitioner departs from the inquiry required by *Collins*. At no point did this Court say that the size of the allocation of resources is at all relevant to the arbitrariness inquiry. This Court could have easily said that it needed to know what the cost of employee training might be, or how much city resources might be consumed in warning employees of sewer gases. However, it did not make that inquiry, and moreover held it to be irrelevant and beyond the court's scope. Therefore, Metro's acts and omissions under the policies relied upon by petitioner do not bear the stamp of arbitrary acts. Nor do they approach the type of acts that shock the conscience of the courts. *Rochin v. California. Id.*

CONCLUSION

The District Court and the Sixth Circuit were correct in their decisions – this is essentially a negligence action. Therefore, there is no basis to grant certiorari in this case.

Respectfully submitted,

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